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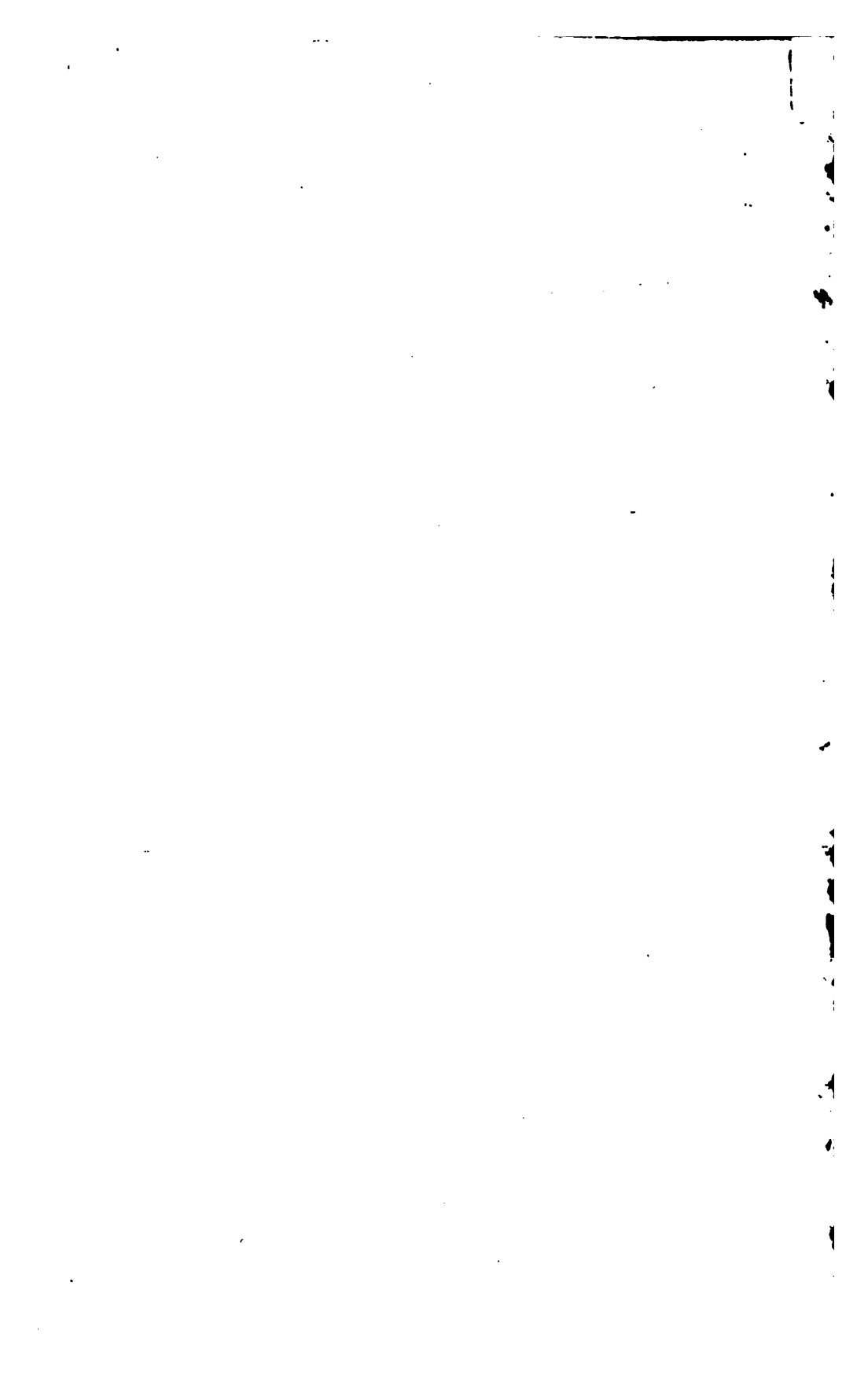
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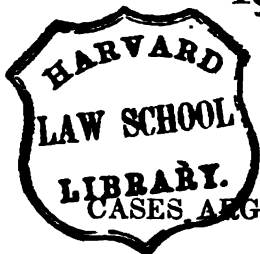






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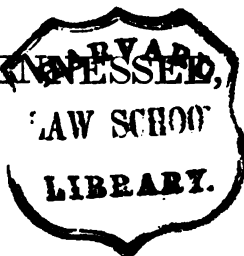
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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

DURING THE YEARS



1843-4.

BY WEST H. HUMPHREYS,

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HON. NATHAN GREEN,  
" WILLIAM B. REESE, } *Judges of the*  
" WILLIAM B. TURLEY, } *Supreme Court.*  
WEST H. HUMPHREYS, *Attorney General.*

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF TENNESSEE.**

~~~~~  
**JACKSON, APRIL TERM, 1843.**  
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**WILLIAMS vs. KARNES.**

1. To write concerning a man these words, "I look on him as a rascal, and have watched him for many years," is a libel. Any injurious declaration of another, by writing or equivalent symbols, is libellous. It does not require the imputation of crime to constitute libel, as in slander. The distinction is founded in the deliberate malignity displayed by reducing the offensive matter to writing.
2. The act of 1741, making the offence of mismarking triable before a Justice of the Peace, and punishing the first offence by a pecuniary penalty, and the second by stripes, is unconstitutional and void. To charge a person with an offence not indictable, or if indictable not subject to infamous or corporal punishment, does not subject the person making the charge to an action for slander, without proof of special damage.
3. Karnes said of Williams, "Williams altered the ear-mark of my hog from mine to his, or procured it to be done." Held, that these words did not *per se* import, that the mismarking was done for the purpose of fraudulently appropriating the property, and, therefore, a declaration was demurrable without an averment, that Karnes fraudulently intended to appropriate.

This is an action on the case for libel and slander, instituted in the Circuit Court of Gibson county by Williams against Karnes. The declaration contained two counts, one for libel and the other for slander. The defendant filed a general demurrer to the declaration; the demurrer was sustained and judgment rendered for the defendant at March term, 1843. The plaintiff appealed.

[Williams vs. Karnes.]

*McLanahan*, for plaintiff, relied on the following authorities: 1st Scott, p. 50, ch. 8, sec. 2, Haywood & Cobb, 253, sec. 67, 2 Hump. R. 512, 10 J. R. 447, 8 J. R. 455, Starkie on Slender, top page 99 and 55, and authorities there cited.

*A. W. O. Totten*, for defendant, cited and commented on the following authorities: Act of 1741; Bill of Rights, sec. 14 and 6; Archb. Cr. Law, 2; 1 Saund. R. 135, Note 4; Com. Dig. Title Indictment Letter E.; 2 Bur. R. 803; 5 J. R. 191; 2 W. Bl. 750; 2 Sel. N. P. 43; 1 J. C. 129; J. R. 10 vol. 447; 8 J. R. 455; 2 Hump. R. 512.

REESE, J. delivered the opinion of the court.

This is an action on the case for defamation. The declaration contains a count for words spoken, and also for the writing and publication of a libel. The defendant filed his demurrer to both counts of the declaration, and the demurrer was sustained by the judgment of the Circuit Court. To reverse this judgment the plaintiff has prosecuted his appeal in error to this court. The count for verbal slander alleges the defamatory words to have been as follows: "Joseph Williams altered the ear-mark of my hog from my mark to his, or procured it to be done." The offence of "mismarking" is made punishable by the act of 1741 by a pecuniary penalty for the first conviction, and by stripes for the second. This offence is not comprised within our present criminal or penitentiary code, and by the act of 1741, the power of punishment appears to be given, not to the courts of record by indictment, but to a Justice of the Peace, and, therefore, inconsistent with our constitution and bill of rights. For these reasons it is urged that the offence of "mismarking" is no longer indictable, or if indictable, is not subjected to corporal or infamous punishment: and, therefore, that the imputation of the offence does not amount to verbal slander without the allegation and proof of special damage. And this we think is so, for the reasons stated. But if this were otherwise, still the words charged as being defamatory, having no intrinsic or fixed meaning importing crime, it should have been

(Williams vs. Karnes.)

shown by the colloquium or otherwise that the word "altered" imported that the plaintiff had the fraudulent purpose of depriving the defendant of his property and of appropriating it to himself. We are of opinion, therefore, that the demurrer was properly sustained to the count for verbal slander. The paper alledged to be a libel is as follows:

"May 28th, 1842. Notice. Tenn. Gibson county. I say to the people and world at large, that the Reverend Joseph Williams has been blowing and telling about through this country, that he is going to sue me for killing one of my own hogs, though my mark had been altered and made into his, which I can prove. The said Williams has never been to see me about the hog, though he says it was his, I suppose; but I do not think that he will ever commence a suit, though I believe him to be none too good to claim my hog. I look on him as a rascal, and have watched him for many years. For fear people may be at a loss to know what Williams this is, I will say he lives near Wolf creek, a cabinet workman. And if the said Williams wishes to find me I never will be from home longer than four and twenty hours at a time; and if he wishes a suit I am ready and willing at any hour.

ABRAHAM KARNES."

A libel or written defamation is the injurious detraction of any one by writing or equivalent symbols. The common law, in view of the natural passions of man, gives no action for mere defamatory words spoken, unless producing special damage, and confines the action of slander to such grosser words as impute positive crimes. It is not so, however, with written defamation; the words in such cases are not considered the results of transitory passion or levity, but gain the stamp and shape of an effective and mischievous malignity. Lord Holt says, (3 Salkeld, 226,) "Scandalous matter is not necessary to make a libel. It is enough if the defendants render an ill opinion to be had of the plaintiff, or make him contemptible and scandalous." So also, (Skinner, 124,) to say of any man he is *dishonest*, is not actionable, but to publish so, or put it upon posts, is actionable. This distinction not existing in early times, was brought in question in *Thornley vs. Lord Kerry*\* in the Ex-

\*4th Taunton, 335.

[The State vs. Baker.]

chequer Chamber, and Chief Justice Mansfield himself, doubting the correctness of the distinction, admits it must be regarded as settled by the opinions of some of the greatest names known to the law, Hardwicke, Hale, Holt and others. The distinction has been fully sanctioned by the American cases. And this being so, it is not necessary to scan with any care the meaning of the paper before us. It is obviously libellous, and the demurrer to that extent must be overruled.

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THE STATE vs. BAKER.

A presentment was made by twelve jurymen under oath and by one acting with them not under oath: Held, that the presentment was void, for it may have been founded on the information of him who was unsworn; *secus*, with regard to an indictment, for it is founded upon proof.

*Raines*, for the plaintiff in error.

*Attorney General*, for the State.

TURLEY, J. delivered the opinion of the court.

This is a presentment against defendant for gaming, to which he pleads in abatement, that one of the grand jurors who acted upon the presentment was not duly elected, empaneled, sworn and charged as a grand juror. To this plea the Attorney General replies, that there were twelve other jurors, who were duly elected, empaneled, sworn and charged to enquire of offences, and that they were good and lawful men of the county and made the presentment. To this replication, there is a demurrer, and joinder, which demurrer was overruled by the court below and judgment rendered against the defendant, who prosecutes his writ of error to this court. We hold that twelve good and lawful men constitute a legal grand inquest, and that indictments found by them are good, though there be a thirteenth man acting with them, who is not of record a member of the body; but that it is not so with presentments; and this be-



[Woodfin vs. Hooper.]

cause bills of indictment are founded upon proof, presentments upon information of some one of the grand jury. Twelve men may legally find a true bill upon proof, but in the case of presentments, if there be one of the jury not legally a member of the body, the presentment is void, because it may have been found upon his information, which would not be under oath.

Judgment reversed.

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WOODFIN vs. HOOPER.

The right of a creditor to imprison the body of a debtor existing at the time of the formation of the contract is no part of the contract. It is a remedy given by law for the enforcement of the contract and may be repealed. The legislature may vary the nature and extent of the remedies and prescribe the times and modes in which remedies shall be pursued. Yet have no power to abolish all the remedies existing at the time the contract was made, so as to leave the creditor no redress.

Woodfin made an affidavit before the Clerk of the Circuit Court of Fayette county, on the 7th day of September, 1842, which set forth, that affiant had a good cause of action against G. W. Hooper, and that said Hooper had or was about to remove his property beyond the jurisdiction of the court. Upon this affidavit the clerk issued a *capias ad respondendum* against Hooper; he was arrested and executed a bail bond with surety for his appearance. The plaintiff excepted to the sufficiency of said bond at the return term, on the ground that the said *capias* is that the defendant answer of a plea of trespass on the case, and the bond is to answer him of a plea of trespass. The presiding judge, Dunlap, sustained the exception and ordered that the sheriff, Hudspeth, be deemed and held special bail of the defendant.

On the 16th day of January, 1843, the plaintiff recovered a judgment against the defendant for \$86; on the 31st day of the same month Woodfin made an affidavit before the clerk that the defendant had since the commencement of the action removed his property beyond the jurisdiction of the court, and demanded a *ca. sa.* This the clerk refused to issue. The

[Woodfin vs. Hooper.]

plaintiff, thereupon, moved the court to order the clerk to issue the *ca. sa.* Dunlap, judge, overruled the motion and the plaintiff filed his bill of exceptions to the opinion of the court, and prayed an appeal in the nature of a writ of error which was allowed.

*J. C. Humphreys*, for Woodfin. This case must be considered with reference to the remedy against defendant which the plaintiff had at the time the contract was made. What remedy did the law then give?

He was entitled of right to an execution against the property immediately on the rendition of judgment in his favor, and wherever the act of 1831 applied (the act abolishing imprisonment for debt, except in cases of fraud) he could have an execution against the body. He could also where that act applied at any time before judgment arrest the defendant upon a *capias ad respondendum*.

Does the act of 1842 impair the remedy of the plaintiff thus defined? The answer must be in the affirmative. Execution against the body as a remedy to enforce satisfaction from the defendant, was of the greatest importance. It was not a punishment to be inflicted upon an unfortunate debtor who was unable to pay, but was by the act of 1831 limited to those cases where the defendant was able to pay but fraudulently contrived to defeat the payment, and in some of the cases mentioned in the act of 1831 the plaintiff had no other remedy. For instance, where the defendant had thousands of dollars in money but no visible property. Also the present case. The defendant is sued, and before judgment against him he removes his property to Texas.

Suppose the defendant is about to remove his property, what remedy is the plaintiff entitled to before he has obtained judgment? The attachment laws do not apply.

The defendant not being a non-resident, nor having absconded and left the State an attachment in Chancery would not lie. He is not a non-resident, nor has he removed, nor is he removing himself out of the county privately, nor does he so abscond or conceal himself that the ordinary process of the law cannot

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be served upon him, and so an attachment at law would not lie. And if an attachment at law would lie, the defendant could replevy the property attached by giving special bail, and the act of 1842 takes away the *ca. sa*, and the plaintiff's remedy upon the bail bond is destroyed. But an attachment at law would not lie.

This the law (existing at the time of the contract) supposed to be an effectual remedy. When the defendant has removed or is about to remove his property before judgment his body shall be arrested; and after judgment, as an execution against property would be utterly useless, the defendant shall be confined in jail until he doth the plaintiff that justice which he is fraudulently endeavoring to evade. The law not only supposes this to be an effectual remedy, but it provided no other for the case. It is a remedy that, until now, has prevailed in this State—that prevailed in every State whose jurisprudence is founded upon the law of England—that dates its origin to an act of Parliament, as ancient almost as the common law itself, and its efficiency is sustained by proof as high, viz, the test of time and the wisdom of successive ages.

Legislation in this State before the contract in question was made had restricted this remedy to cases where there could be no hardships in applying it, and as before shown to cases where it was the only appointed remedy. The defendant arrested could obtain his discharge upon motion to the court in term time, or upon *habeas corpus* in vacation where the grounds of his arrest were false, or mistaken, or insufficient, or by making a surrender of his property, and even a fraudulent defendant would escape imprisonment by giving sureties to keep within the jail liberties, the space of one mile square. But the act of 1842 abolishes this remedy in all cases.

Does it provide a substitute? None whatever is given or proposed in the act. It abolishes the only remedy which defeats the fraudulent contrivances of the defendant to avoid performance of his contract. It abolishes a remedy which can only be obtained against such defendant, and differing from the act of 1831, which abolishes imprisonment for debt except in

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freedom until the act of 1829, and their bill filed under that act, gave it to them. In this case though, the plaintiff had a right—not a right granted by the legislature and to be prosecuted against the State—but a right which neither the State nor the legislature had any power to divest or destroy—a right which depended on contract—which existed against another member of the body politic, and in which the State had no concern except its duty under that provision of our constitution which requires that “all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay;” which, says Judge Haywood, in *Townsend vs. Townsend*, Peck, “relates to every possible injury a man may sustain, and includes the right to demand execution of a contract.”

*L. H. Coe*, for the defendant. The question raised in this case is, whether the act of the General Assembly of Tennessee, passed in November, 1842, abolishing imprisonment for debt is unconstitutional and void. It repeals all laws authorizing the issuance of a *ca. sa.*

Does this law abolishing the *ca. sa.* impair the obligation of the contract between Hooper and Woodfin, or is it retrospective in its operation?

A contract is an agreement to do or not to do a particular thing. Hooper's contract was by a given day to pay certain monies to Woodfin; for his default to do so suit was brought.

The act abolishing the power to issue a *ca. sa.* does not authorize the discharge of Hooper's contract by the payment of a smaller sum, or at a different time, or in a different manner than the parties had stipulated; nor does it substitute for the contract of the parties, one which they never entered into, and to the performance of which of course they had never consented.

In the sense of the constitution, any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations in the contract, necessarily impairs it. Story's Ab. Com. Const. Law, 503. The contract

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itself between Hooper and Woodfin, it will not be insisted, (or the obligation of the contract,) has been in any manner altered.

The issue then is narrowed down to the simple question, does the repeal of the *ca. sa.* law abolish all remedies, so that there remains no means of enforcing the obligation of Hooper and no redress to Woodfin?

I think it does not within the meaning of the constitution.

The legislature may vary the nature and extent of remedies, so always that some substantive remedy be left. *Ib.* 504.

The remedy acts upon the broken contract and enforces a pre-existing obligation. And a State legislature may discharge a party from imprisonment upon a judgment in a civil case of contract without infringing the constitution, for this is but a modification of the remedy. *Ib.* 504.

So if a party should be in jail and give a bond for the prison liberties, and to remain a true prisoner until lawfully discharged a subsequent discharge by act of the legislature would not impair the contract, for it would be a lawful discharge in the sense of the bond. *Ib.* 504-5.

A State may refuse to allow imprisonment for debt and yet the debtor may have no property. *Ib.* 502.

The States have the right to regulate or abolish imprisonment for debt as a part of the remedy for the enforcement of contracts. *Mason vs. Haile*, 12 Wheaton, 370.

The court will not declare a law unconstitutional unless the opposition between the constitution and law be clear and plain. It is at all times a question of much delicacy which ought seldom if ever to be exercised. *Fletcher vs. Peck*, 2 Cond. R. 308.

In *Peck's Rep.* 17, will be found the definition of the word retrospective as used in our State constitution, to wit: "That no retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made, the latter words relating equally to both the preceding substantives; and, therefore, that the term retrospective alone, without the explanatory words, can have no influence in this discussion."

[Woodfin vs. Hooper.]

TURLEY, J. delivered the opinion of the court.

In this case Woodfin, the plaintiff, sued out of the Circuit Court of Fayette, on the 7th September, 1842, a writ of *capias ad respondendum* against the defendant, Hooper, which was served by the sheriff, and an insufficient bail bond taken for his appearance, to which the plaintiff excepted, and took such steps at the September term, 1842, of said court as to hold the sheriff responsible as appearance bail. At the January term, 1843, the plaintiff obtained judgment against defendant, and moved the court for a writ of *ca. sa.* thereon, which was refused by the court, and this writ of error is thereupon prosecuted.

The question presented and argued involves the constitutionality of an act of the last legislature abolishing the use of the writ of *ca. sa.* altogether. This act, the plaintiff argues, impairs the obligation of his contract made previous to its passage, and, therefore, can have no obligatory force in his case. This proposition is denied by defendant, and the weight of authority clearly sustains him. Mr. Story in his *Treatise on the Constitution*, page 503-703, says: "In the next place, what may properly be deemed impairing the obligation of contracts in the sense of the constitution? It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations in the contract necessarily impairs it. The manner or degree in which the change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance, which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are a part of the contract, however minute or apparently immaterial in their effect, impair its obligation. *A fortiori*, a law which makes a contract wholly invalid, or extinguishes or releases it, is a law impairing it. Nor is this all; although there is a distinction between the obligation of a contract and a remedy upon it, yet if there are cer-

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tain remedies existing at the time when it is made, all of which are afterwards wholly extinguished by a new law, so that there remains no means of enforcing its obligation, and no redress, such an abolition of remedies operating *in praesenti* is also impairing the obligation of such contract. But every change and modification of the remedy does not involve such a consequence. No one will doubt that the legislature can vary the nature and extent of remedies, so always that some substantive remedy be in fact left. Nor can it be doubted that the legislature may prescribe the terms and modes in which remedies may be pursued, and bar suits not brought within such periods and not pursued in such modes. Statutes of limitations are of this nature, and have never been supposed to destroy the obligation of contracts, but to prescribe the time within which the obligation shall be enforced by suit, and in default, to deem it either satisfied or abandoned. And a State legislature may discharge a party from imprisonment upon a judgment in a civil case of contract without infringing the constitution; for this is but a modification of the remedy, and does not impair the obligation of the contract. So if a party should be in jail and give bond for the prison liberty, and to remain a true prisoner until lawfully discharged, a subsequent discharge by an act of the legislature would not impair the contract, for it would be a lawful discharge in the sense of the bond." This is stating the law very strongly for the defendant, and the Commentator's is a name of great weight in the law; and his propositions are fully sustained by adjudicated cases. In the case of *Sturges and Crowninshield*, 4th Cond. Rep. 410, it was adjudged by the Supreme Court of the United States, "that the right to imprison a debtor is no part of the contract, and he may be released from imprisonment without impairing its obligation." In the case of *Mason vs. Hale*, 6th Cond. Rep. 535, it is held, "that the States have a right to regulate or abolish imprisonment for debt as a part of the remedy for enforcing the performance of contracts." We are, therefore, of the opinion that our act of the legislature abolishing the use of the writ of *ca. sa.* is a good and valid act; and that the Circuit Judge committed no error in refusing the motion of the plaintiff in this case, and dismiss the appeal.

**BROWN & HERNDON vs. WILLIAMS.**

1. The defendant, with a view to prove a set-off, asked a witness what credits he had seen entered on the books of the plaintiffs to the defendant. The plaintiffs objected to this question, but the court overruled the objection and ordered the witness to answer it. The plaintiffs thereupon produced and proved copies of the defendant's accounts, debits and credits, to which defendant objected. This was overruled and defendant thereupon moved that all the testimony given in on the books be excluded, which motion prevailed: Held, that this was error. The books of the plaintiffs had become competent testimony by the course of examination of the defendant, and having been legally heard, it was illegally excluded.
2. Where the books of the plaintiffs were made testimony by the defendant, and the Judge afterwards erroneously excluded them, and the plaintiffs moved for a new trial on that ground alone: Held, that the court would not reverse the judgment on that ground, as the plaintiffs could not make his books testimony again, the defendant objecting thereto.

This is an action of assumpsit which was instituted in the Circuit Court of Fayette county, by Brown & Herndon, partners, against H. B. L. Williams. The defendant pleaded non-assumpsit and set-off. And the case was submitted to a jury at the September term, 1842, Dunlap, Judge, presiding. The trial involved the adjustment of mutual complicated accounts between the parties, and resulted in a verdict of \$202 for the plaintiffs. With this amount they were dissatisfied and moved the court for a new trial. The motion was overruled and judgment rendered on the verdict. They appealed.

All the facts upon which the case turned are stated in the opinion of the court.

*Coe*, for the plaintiffs.

*Searcy*, for the defendant.

**GREEN, J.** delivered the opinion of the court.

On the trial below in this case the defendant asked a witness, introduced by the plaintiffs, what credit he had seen upon the books of the plaintiffs in favor of the defendant. The plaintiffs attorney objected to the testimony, unless a copy from the books were received, showing the debits as well as the credits on the defendant's account. The court directed the wit-



[Brown &amp; Herndon vs. Williams.]

ness to answer the question. Whereupon the plaintiffs produced two papers containing the debits and credits of the defendant's account, and proved them to be true copies from the books. The defendant's counsel then moved the court to exclude from the jury said evidence; but the court decided that if the defendant so proved the credits by the witness, it was competent for the plaintiff to prove such examined copy of the books as evidence of the debits. Whereupon the defendant moved the court to withdraw from the jury said proof as to the debits and credits also; which was done by the court, and to which the plaintiffs excepted. The plaintiffs' counsel now insists, that the copy from the books had, by the action of the defendant, been made legal evidence, and as such had been placed before the jury, and that it was unlawful for the court afterwards to exclude it. And we think the argument is correct.

The Circuit Court has the right to reject any illegal testimony when offered, or if it shall have been inadvertently put before the jury, the court may at any time during the progress of the cause, exclude it from the jury, and direct them to disregard it. But the court has no right to exclude legal testimony; and all the proof that may have been legally heard is legal testimony, though it become such by the course of examination on the adverse side. It will not do to permit one party to make experiments to obtain testimony to which he is not legally entitled; and when he is permitted by his adversary to do so, who thereupon presents his proof to which he becomes entitled by such course of examination, to turn round and ask for the exclusion of the whole. The proof having been placed legally before the jury, by the manner in which the parties have brought it forward, is no more liable to be excluded afterwards, than any other legal proof in the cause; although, if objected to from the proper quarter, it may not have been admissible. But although the practice of the court in the case before us was erroneous, yet it is impossible to afford the plaintiff a remedy by reversing this judgment and ordering a new trial. This court cannot require the defendant to pursue the same course of examination on another trial, which was adopted on the former one; and it is manifest he would not do so. Unless, therefore, he were

[Caldwell vs. Harris, adm'r.]

to offer to prove his credits in the same way, the plaintiffs would get no benefit by a new trial. His honor, the Circuit Judge, excluded *all* the proof derivable from the plaintiffs' books, which he might properly have done at the outset, had the defendant then objected; and as it is manifest the defendant will so object on another trial, the evidence, for the exclusion of which the plaintiffs now justly complain, will be then properly rejected.

This, like many other matters of practice in the courts below, is beyond the power of this court to correct, and must rest upon the sound discretion and responsibility of the Circuit Judges. Let the judgment be affirmed.

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CALDWELL vs. HARRIS, adm'r.

Harris, as administrator of McCollum, deceased, rented land to Caldwell; Caldwell took possession of the land by virtue of the contract and enjoyed the benefit of it: Held, that in a suit by Harris, as administrator, against Caldwell, that Caldwell had no right to dispute Harris' power to make the contract, but was bound to pay the sum agreed on.

Caldwell sued Harris, administrator of McCollum, before a Justice of the Peace of Dyer county, and recovered a judgment against him. The Justice, however, allowed an setoff, with which the plaintiff was dissatisfied and appealed to the Circuit Court. The judgment was there (Harris, Judge, presiding) affirmed. The plaintiff appealed in error.

*Gardner*, for Caldwell.

*Totten*, for Harris.

GREEN, J. delivered the opinion of the court.

Caldwell sued Harris for the balance of an account against his testator, for the hire of negroes. Harris offered as an setoff an account for the rent of 18½ acres of land at \$1 25 per acre,

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which Caldwell had rented from him as administrator of McCollum, and had enjoyed. It was objected, that the administrator had no power to rent the land of his intestate, and, therefore, the setoff ought not to be allowed. The court overruled the objection, and a verdict and judgment were rendered in favor of the plaintiff for the amount due after deducting the said setoff. The plaintiff appealed to this court. We think the court acted rightly in permitting proof of this amount as a setoff. A party who rents land of another, and goes into possession under him and enjoys the land, cannot, when called on to pay the rent, dispute his landlord's title. He acknowledged the landlord's title when he made the contract of lease and took the possession; and he cannot deny it when he is required to restore the possession and pay the rent. Besides there is no evidence in this record showing what was the character of interest the intestate McCollum had in this land. It may have been only a chattel interest, which would go to the administrator. Let the judgment be affirmed.

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GREENLOW vs. THE STATE.

This indictment against an overseer of a road averred, that the road of which he was overseer was ruinous and out of repair; and that it was not measured and mile-marked; and that no posts of durable wood at each mile were set up: Held, that it charged two distinct offences in the same count, and was, therefore, not a good indictment.

Greenlow was indicted in the Circuit Court of Shelby county, and the case was submitted to a jury at the February term, 1843, Dunlap, Judge, presiding. The Jury returned a verdict of guilty. The defendant moved in arrest of judgment. The motion was overruled, and judgment rendered, and the defendant appealed.

*Daniel*, for plaintiff in error. This indictment contains but one count, and that count charges two distinct offences. 1st. Not repairing the road; and 2d. Not mile-marking it. Different penalties are attached to these offences by the statutes; and

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words or allegations which may have been the grounds of the verdict cannot be rejected as surplusage. 11th Mass. 93, 2d Mass. 163.

*Attorney General*, for the State.

GREEN, J. delivered the opinion of the court.

The indictment in this case contains but one count. It charges, that the plaintiff in error being overseer of the road leading from Raleigh to Memphis, permitted said road to be out of repair, and ruinous; and that said road was not carefully measured and marks and posts of durable wood at each mile set up on said road. The defendant was found guilty, and fined five dollars; and from which judgment he appealed to this court.

The indictment in this case charges two distinct offences in the same count, and for this reason it is bad. By the act of 1804, ch. 1, sec. 9, overseers of roads are made indictable for failing to keep the road in repair; and as no specific penalty is affixed, they may of course be punished as persons guilty of other misdemeanors are punishable. By the act of 1819, ch. 26, sec. 5, it is provided, that the grand jury may present overseers of roads for failing to mile-mark, and set up posts marked, &c., and that on conviction, he shall be fined in a sum not exceeding five dollars. These acts constitute the offence of failing to keep the roads in repair, and the offence of failing to mile-mark the road, and set up posts at each mile, entirely different and distinct offences; the punishment of the one being limited to a fine of five dollars, while the punishment of the other may be by a fine as high as fifty dollars. The indictment is, therefore, double, and for that reason vicious. Reverse the judgment.

## STONE vs. THE STATE.

1. Stone was indicted for the murder of Mitchell. On the trial, the attorney general offered proof going to establish the fact, that Stone had, some short time before the murder of Mitchell, set fire to the house of Mitchell in the night. The proof was offered for the purpose of proving Stone to have been the perpetrator of the murder. Held, that the proof was not admissible.
2. Where illegal testimony is permitted to go to the jury without objection either on its introduction or in the argument of the case, its illegality is waived, and a new trial will not be granted in consequence of its admission.
3. Stone was indicted for the murder of Mitchell; and proof was admitted, showing that Stone had beat his wife and forced her to abandon his house and seek refuge under the protection of the deceased. Held, that the protection afforded by the deceased was an aggravating circumstance to the prisoner, and therefore proper proof of malice prepense on the part of the prisoner, and that the incidental abuse accompanying and perhaps inducing the flight of the wife, is not such proof upon a separate criminal charge as vitiates the verdict.
4. Affidavits charging the jury with irregularities and misconduct in the progress of the trial, founded on information and belief, are not sufficient to set aside a verdict. The irregularities and misconduct charged must be stated positively and specifically, and be sustained by oath.
5. The court is not authorized to set aside a verdict on the reported observations of jurors, admitting their misconduct during the progress of the trial.
6. Affidavits were offered on a motion for a new trial, showing that the jury ate, and drank ardent spirits at their meals, during the progress of the trial. Held, that this did not vitiate their verdict. If the jury, or a portion of it, ate, or drank ardent spirits, or slept, during the progress of the trial, so as to disqualify them, or any of them, from properly considering the case, the circuit judge should have awarded a *venire facias de novo*. Not having done so, it will be presumed, in the absence of proof, that no such disqualification existed.
7. That the accused may have the full benefit of a jury of his peers, no impression should be made on the minds of the jurors, except what is derived from the testimony; and to secure this, they must not be permitted to separate and mingle with the balance of the community, *without explanation, showing they had not been tampered with*. It is not, however, necessary for the accused to show that they had not been tampered with.

At the June term, 1842, of the circuit court of Obion county, the grand jury indicted Stone for the murder of Mitchell. Stone pleaded not guilty, and the cause was submitted to a jury at the same term; Harris, judge, presiding. It appeared that Mitchell was shot in his house in Obion county, in the night, by some unseen person, through a crack in the house. He died instantly, and the assassin fled. The only question submitted to the jury was, whether Stone was the perpetrator of the murder. F. Brown, a stepson of Stone, was introduced on behalf of the state, and sworn. He testified, that he had lived with Stone, and that some short time before the death of

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Mitchell he and his mother had fled from the house of Stone and went to Mitchell's house for protection against the violence of Stone, and that Mitchell had given them protection. On cross examination he was asked by defendant's counsel if he had not been and was not then unfriendly with the prisoner. To this, witness replied in the affirmative. The attorney general then asked why he was unfriendly with Stone. He said that he was unfriendly with him because Stone had charged him with board and tuition when he was receiving the benefits of his labor. The attorney general then enquired whether Stone had not maltreated his wife, and how. Witness replied, that Stone had repeatedly "whipped her with a hickory switch for little or nothing." The counsel for the defendant objected to the witness's answering this last question. The objection was overruled, and the statement submitted to the jury.

It appeared, that at the time Mrs. Stone was at the house of Mitchell, Mitchell's house was set on fire, in the night, by an incendiary. There was much circumstantial testimony submitted to the jury, going very satisfactorily to prove that Stone had set fire to Mitchell's house. This testimony was not objected to at the time of its introduction or on the argument of the case. In the progress of the trial, before any of the evidence was heard, and after the jury were sworn, one of the jurymen stated to the court that he wished to speak to a man by the name of Outlaw. The court ordered Outlaw to come in. When he came in, he advanced towards the jury and the juror moved towards Outlaw, and at the moment when engaged in conversation, or in the act of engaging in conversation, the court discovered them and ordered Outlaw to stand back, fined the juror ten dollars, and ordered the juror that any communication he had to make must be done in the hearing of the court. The juror then said that he wished to send a message to his wife in reference to the sickness of a member of his family.

The jury returned a verdict of guilty of murder in the first degree, and that there were mitigating circumstances attending the commission of the offence, and recommended the defendant to the mercy of the court.

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The defendant moved the court to grant him a new trial, and presented, in support of the motion, several affidavits.

Williams stated, that during the progress of the trial he saw a part of the jury on the public square, some forty or fifty yards from the tavern at which they lodged; that they were walking off, and that the constable sworn to attend them (Wagster) was not with them; that in a short time afterwards he saw the officer, accompanied by another juror, passing on in the same direction, and "so he says he saw a separation of the jury."

Brown's affidavit states, that during the progress of the trial he saw Wagster, the officer sworn to attend the jury, about one hundred yards from the tavern where the jury were kept, that he remained at the house where affiant was several minutes, conversing with the persons about, and that none of the jury were with him.

Gardner, Raines, Leigh and Harris stated, that jurymen Mills, after he was sworn, whispered with one Outlaw, and that they believe the purport of that conversation was not correctly stated to the court; that they are informed and believed that one night at least, during the progress of the trial, the jury was left alone in a room whilst the officer sworn to attend them visited a distant portion of the town; that they are informed and believe that ardent spirits had been drank by the jury in considerable quantities during the trial; that they were informed and believed that the whole jury were seen in a public room surrounded by a crowd; that one juror slept during the examination of the testimony in open court; that on the information of one of the jurors, they declared that the jurymen were separated several times: that said juror promised to furnish an affidavit of this fact, but that after a consultation with his fellows each of the jurors refused to make any communication in regard to their conduct during the trial; that one of the affiants heard a juror ask another person, in a suppressed tone of voice, whether any advantage could be taken of a separation of the jurymen for a short time, if that separation was rendered necessary by the calls of nature.

Edmonds states, that he heard an individual say that one of the jurymen had acknowledged to Leigh that they had sepa-

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rated during the time they had the case under their consideration.

The counsel of the defendant moved the court for compulsory process to bring in the jurymen, to testify in regard to their conduct during the trial. This motion was argued; and after argument, overruled by the court. The court stated, that if any of the jurymen would voluntarily come forward and testify in regard to the irregularity complained of, it would be heard. Thereupon two of the jurymen came forward, and stated that the jurymen were never separated so far from each other but that the officer could see them all at once; that in attending to the calls of nature, they separated for a short time but that they were not separated so far but that the officer could see them all at one time. They also stated that they had never drank any ardent spirits except at their meals, and that no juror took more than one drink. Another juror and Wagster the constable offered to be sworn, but the defendant's counsel declined examining them.

Crocket, the sheriff, was then examined. He stated that when Wagster, the constable sworn to attend the jury, was absent, as stated in Brown's affidavit, that he was with the jury himself, and that he had sent Wagster off to make arrangements for lodging the jury. He stated that he knew of no time when the jury were left without either Wagster or himself being with them. Whilst he was with them they never separated so that he could not see them all at the same time. He had not said any thing to them about the case.

This motion was overruled, and the defendant sentenced to confinement in the penitentiary for and during his natural life.

He appealed in error from this judgment.

This case was argued by Messrs. *Huntsman, Rains* and *Gardner* for the plaintiff in error, and by the Attorney General on behalf of the State.

TURLEY, J. delivered the opinion of the court.

The prisoner, James N. Stone, was indicted, tried and con-



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victed for the murder of John B. Mitchell, at the June term of the Obion circuit court, 1842; and upon the recommendation of the jury, sentenced by the court to confinement in the jail and penitentiary of the state during his natural life. The testimony as to the guilt of the prisoner is voluminous; and in the investigation of it, all the court can do will be so to examine it as to show that the jury have not acted with any degree of rashness in finding their verdict; but were warranted by the circumstances proven in coming to the conclusion they did.\* There is much of it immaterial to the result, and a minute examination of which would swell this opinion to an unnecessary extent. It appears from the testimony of John F. Prinn, that the deceased was killed in his own house, in Obion county, on the night of the 3d of October, 1841, a little after dark, being shot with two bullets, through a small crack in the house. It further appears with sufficient certainty, that as early as three or four years before the trial, Stone and Mitchell had quarrelled, and that Stone had threatened to kill him; that this difficulty had been settled between them in Dec. 1839, or Jan. 1840, and that they had been friendly from that time until about the month of June, 1841; that about that time one Artimesia Owens, of whom prisoner had been guardian, married one Graham, who sold to the deceased a tract of land upon which the prisoner as guardian had settled, called the Ferry place; and that when prisoner heard of it, he became angry with deceased, and said he hoped the place might never do him any good; and that if he could help it, it never should; that deceased sued prisoner for the premises, but that upon the trial they again made up their quarrel and continued apparently friendly until the house of the deceased was fired, which event took place on the fifth day of Sept. 1841, and that the prisoner was accused of having been the perpetrator of that offence; that the prisoner lived unhappily with his wife, and occasionally treated her so badly as to force her to the house of the deceased for protection; that she had done so on the night his house was fired, and that she was living then with him; that

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\* *Dunes v. the State*, 2 Humphreys; *Kirby v. the State*, 3 Humphreys.

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the prisoner left the neighborhood on the 8th of September, 1841, and on the 11th passed down the river Mississippi in a steamboat by the house of the deceased; that one week before the murder of the deceased, the steamboat Pensacola stopped, on her passage up the river, about two miles above the house of the deceased, and sent her yawl ashore; that no person lived at the point. These facts appear from the testimony of Frederick Brown, a stepson of the prisoner, aged about sixteen years. This testimony is indirectly attacked, but we think not sufficiently so to impeach it. It further appears, from the testimony of Franklin Longley, the brother-in-law of the prisoner, that Mitchell had threatened Stone; that witness was at Mitchell's house the morning of the murder; that he was acquainted with prisoner's foot tracks; that he wore a pair of boots that were broader across the ball of the foot than is usual; that he examined the foot prints through the field of the deceased; that the tracks led from the house and seemed to be made by a person running; that he believed the tracks were those of the deceased, but does not know whether they were made by a shoe or a boot.

John M. Kimberly proves, that he saw the steamboat Pensacola put out a man in a yawl about two miles from the residence of the deceased; that he was a man of ordinary size, but could not tell who it was, not being near enough to distinguish him.

James Good proves, that the steamboat Pensacola stopped about two miles from the residence of the deceased and sent her yawl ashore, but does not know that any person was landed.

R. E. Graham proves, that he is brother-in-law, by marriage, to the prisoner; that he saw the steamboat Pensacola stop and put out a man about two and a half miles from the house of the deceased; that the next day he saw a track which he supposed to be the passenger's; believes it to have been the prisoner's; that he saw the tracks leading from the house of the deceased the morning after the murder, and believed them to be the tracks of the prisoner, the same he had seen on the river, and that deceased was killed on the first night after he moved into the house about which he and prisoner had had the difficulty.

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Daniel Moses proves, that about a week before the murder, he saw in the neighborhood of the deceased an individual that he took to be a negro woman with a gun on her shoulder; that the person turned out of the road about one hundred yards from him; that he was alarmed and could not tell whether it was a white man or negro.

Earle S. Thayer proves, that on the Sunday before that on which the deceased was murdered he saw the steamboat Pensacola stop and put out a man about two and a half miles from his house; that early on next morning he went out to hunt and saw the prisoner in the road three fourths of a mile from the house of the deceased; that he had a gun, and seemed not inclined to stop and talk; that he knows prisoner well, and is certain it was him.

Archibald Crocket proves, that he captured the prisoner at Memphis, and whilst he was in custody he conversed with him about the murder, and that the prisoner informed him that he had not been in the county of Obion since the 8th of September, 1841; that when he left the county he went to Mills's Point and took passage on a steamboat for New-Orleans; that he returned on the steamboat Pensacola to one Fletcher's, about fifty miles below the residence of the deceased, and from thence went back to Memphis.

A. M. Pool proves, that on the 7th of September he saw prisoner, and told him that the deceased suspected him of having fired his house; advised him to leave the country; that prisoner observed he had been badly treated; that he did not like to go away; that if he could kill one or two of the leaders of them, he would be willing to go away or die; that they were then speaking of prisoner's difficulty with his wife and the deceased.

James R. Parmenter proves, that he saw the tracks at the house of the deceased about two days after the murder; is satisfied they were the tracks of the prisoner.

Listern S. Cashion proves, that he saw the tracks at the house of the deceased and believes them to have been the prisoner's.

The testimony of James L. Clasher, that he heard the report of the gun; that he knew it to be that of the prisoner, and

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observed that he had killed the deceased—is of too doubtful character to have any weight in this examination.

J. Newton proves, that after the house of the deceased had been fired he advised prisoner to leave the country; told him that deceased would kill him; to which prisoner replied, he could shoot as well as him, and he would not go away unless he had satisfaction, and that if he did go he would leave a “big stink” behind him; saw the tracks at the house of the deceased the morning after the murder, and believes them to be prisoner’s.

This is the material part of the proof upon the *corpus delicti*, as extracted from the rude and confused mass of proof in the bill of exceptions. What does it prove? That the deceased was killed on the night of the 3d of October, 1841; that the prisoner and he had had angry difficulties from a period long anterior up to the time of the commission of the offence; that they resulted from mutual wrongs done and charged; the prisoner accusing the deceased of having harbored his wife, to his great personal injury, and the deceased accusing him of having fired his house; that on the 11th day of September, 1841, not many days before the murder, the prisoner left the country in a steamboat, with threats in his mouth of vengeance for his injuries, which he declared he would have before he left; that one week before the murder he returned in the steamboat Pensacola, and kept himself so concealed that but one person saw him certainly; others saw what they took to be his tracks; and one, a person in disguise which he supposes might have been him: that on the night the deceased took possession of the building which had formed the subject of the controversy between them, he was killed, cowardly and treacherously; that the prisoner immediately fled the country again, and being captured at Memphis, denied that he had been in the county of Obion since his first departure on the 11th of September, but admitted that he had returned up the river in the steamboat Pensacola to within fifty miles of the residence of the deceased. Who upon this can doubt of his guilt? It is proven satisfactorily, that the steamboat Pensacola landed a man within some

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two miles of the residence of the deceased: prisoner admits he returned in the boat, and one person at least saw him within three fourths of a mile of the residence of the deceased a few days before the murder. If the prisoner were innocent, why the necessity of his false statement about his return? and if his statement were not false, why did he not take proof of the person at the place where he alleges he stopped, some fifty miles below, to prove this fact! It is not so. And so far from considering that the jury acted with any degree of rashness, we are satisfied ourselves of the prisoner's guilt. But this is not all we have to examine in this case. There are several other propositions which have to be discussed before we can affirm this judgment. And first, there is much proof in the record tending to show that the prisoner was guilty of the offence of firing the house of the deceased; and it is now objected, that this being a substantive felony, the proof going to establish it was illegal. And of this there can be no doubt, upon well settled principles. But it is to be observed, in answer to the objection: 1st, that it is difficult to ascertain from the proof as reported, whether it was not brought out as much by the counsel for the defence as for the prosecution: and, 2d, that the proof was not objected to on its introduction or on the argument of the case; and that proof, that the deceased had accused the prisoner of the offence, was legitimate, for the purpose of showing cause of malicious feeling. And the extension of proof so far as to establish guilt, not being objected to, cannot, upon any principle of legal administration of justice, be regarded as error. If it had been objected to, it might not have been pressed; and if pressed, might have been excluded by the court. It will never do to permit a prisoner to hear illegal testimony, and then assign it as error, after having heard it admitted without objection; for advantage will always be taken of an indiscreet prosecution by such permission. And so, this court, held at Jackson in 1834, in the case of *Murrell v. the State*. The case of *Peek v. the State*, 2 Humphreys, 78, cited for the contrary position, is not in point, but upon a different subject altogether, as is obvious upon its inspection. 2d. There is proof, that the prisoner maltreated his wife, and forced her to abandon his

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house and seek refuge under the protection of the deceased; which was objected to, and, it is argued, ought to have been excluded for the reason assigned in the question of arson, contained in the first objection. We do not think so. The protection afforded by the deceased (to say the least of it, under questionable circumstances,) was a most aggravating offence to the prisoner, and therefore exceedingly proper proof of malice prepense on his part; and the incidental abuse accompanying, and perhaps inducing the flight of the wife, is not such proof upon a separate criminal charge as vitiates the verdict; but whatever of misdemeanor may have existed in the abuse of the wife is entirely merged in the offence of the criminal protection on the part of the deceased, and could not in any event be considered as proof upon an offence not charged. 3d. There are several objections arising out of misconduct on the part of the jury, and of improper guardianship over them during their deliberations upon the case. These two questions arise out of affidavits filed for a new trial, which will have to be examined and their merits tested upon legal principles. The first affidavit relied on, is that of John A. Gardner, J. G. Harris, R. P. Rains and J. Leigh, who swore that the following irregularities were committed by the jury during the trial, as they are informed and believe: They saw a juror named Mills whispering with John C. Outlaw, and that they are informed and believe that the substance of that conversation has not been correctly stated to the court; that they are informed and believe that one night since the commencement of the trial the jury was left alone in their room, whilst the officer sworn to attend them visited a distant portion of the town; that they are informed and believe that ardent spirits in considerable quantities were used by some of the jury during the trial; that they are informed and believe that the whole jury were seen in a public bar room, surrounded by a crowd, a night or two, and while they were charged with the case; that one juror actually slept in open court during the examination of the testimony; that upon the information of one of the jurors, (Elisha Parker,) they believe a part of the jury separated from the remainder several times at night during the trial of the cause; that said Parker promised to fur-

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nish an affidavit of the fact, but that he and the rest of the jury, upon consultation, refused to communicate any thing in regard thereto; that they heard another juror, name not known, in conversation with a third person after their discharge, and the juror asked, in a suppressed tone, if any advantage could be taken of a separation of the jury for a short time, when such separation was rendered necessary by nature. Upon this affidavit the court was asked that the jurymen might be compelled to come into court and testify as to the facts complained of. The least that can be observed of this affidavit is, that it deals in generalities; is supported by information and belief, and not by facts sustained by oath, with the exception of the charges that one of the jury slept during a portion of the trial and that another was seen to whisper to a stranger, and therefore this affidavit cannot be received as establishing any facts save these two. What the juror said, not being on oath, must rest in hearsay and may be untrue. A new trial never has been, and it may safely be predicted never will be granted upon the reported observations of jurors as to their conduct during the trial. This question is settled by repeated adjudications of this state, and has always been upon the question of how far they might impeach their verdict by their own oaths. If hearsay evidence of misconduct in jurors might be received to set aside a verdict, verdicts would indeed be worth but little. The only questions then left upon this affidavit, as affecting the motion for a new trial, are, 1st, whether one juror being seen whispering to a third person, and another being seen asleep for an unascertained period of time, are good causes for a new trial. Upon the first it is to be observed, that the bill of exceptions in the case shows that the whispering complained of took place in open court; and that it was impossible, from the facts stated, that the juror could have been tampered with, as the subject of conversation is satisfactorily shown to have been relative to the health of the juror's family. This bill of exceptions also shows two other causes which are assigned for a new trial: 1st, that the jury drank ardent spirits at their meals during the progress of the trial; and, 2d, that the sheriff, who was not the sworn officer of the jury, had charge of them at a period

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of time when the constable was absent, but that he said nothing to them about the trial. A great deal, first and last, has been said about the beauty and purity of trials by jury, and with truth; and our ancestors were so jealous of its preservation, that many absurd practices relative thereto were introduced into the courts, which, like many other abuses, retained possession of them for a long time: among the rest, the practice of not allowing jurors meat and drink until their verdict was returned. But these restrictive principles have been broken down in most of the states of this Union, and even in England; and the purity of jury trials made to depend not upon form, but substance. That they have still been preserved in this state and New-York to the extent shown in the case of *Brant v. Fowler*, 7 Cowan's Rep. 562, is more a matter of amusement than serious reflection. To show how the law has been held in this state upon questions of this character, we will refer to the opinion delivered in the case of *McLean v. the State*, 10 Yerger, 241, where it is held "that the person accused may have the full benefit of a judgment of his peers, it is absolutely necessary that the minds of the jurors should not have prejudged his case, that no impression should be made, except what is drawn from the testimony given in court, to operate on them; and that to secure this, they must not be permitted to separate and mingle with the balance of the community without explanation, showing that they had not been tampered with, and that it was not necessary for the prisoner to prove that they had not been." The same principle will apply to eating and drinking. A fair and unbiassed expression of opinion is what is required; and any little misconduct, which is shown could not have been attended by bad consequences, will not vitiate a verdict. In this case, the trial was conducted under the inspection of a judge; if eating and drinking or sleeping had disqualified the jury, or a portion of them, from considering the case properly, it would have been his duty to have awarded a *venire facias de novo*. That he did not do so, we must, in the absence of proof, come to the contrary conclusion, and hold that these slight irregularities complained of were entirely innoxious to the prisoner. As to the separation of the jury, complained of, and the introduction



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of the sheriff into their room, all that is necessary to observe, in view of the principles just laid down, is, that it is shown satisfactorily to our minds, that whatever little separation took place, was casual, and of no importance, and that there was no tampering, or opportunity of tampering, furnished by it, and that the sheriff expressly swears that he did not speak to the jury about the case. There are several other affidavits, which do not vary these principles in any material point; and to examine them minutely, would swell this already long opinion to a very unreasonable extent.

Upon the whole, we are fully satisfied with the judgment of the court below, and affirm it.

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PLANTERS' BANK vs. BRADFORD.

The notary in this case had been informed some fifteen months before the day of protest, by the endorser, that he resided at Jackson. He, without enquiry, transmitted a notice to Jackson to the endorser. The endorser had removed some five months before the protest, under circumstances of peculiar notoriety. Held, that due diligence had not been used to ascertain the residence of the endorser, and that he was discharged.

The Planters' Bank instituted an action of debt in the circuit court of Madison county, against A. B. Bradford. The declaration avers, that W. B. Miller executed his bill single to P. M. Miller on the 18th day of March, 1839, promising to pay him the sum of \$4000 four months after date, at the Planters' Bank at Nashville, Tennessee; that P. M. Miller endorsed and delivered the note to A. B. Bradford, and that Bradford endorsed and delivered it to the Planters' Bank. The defendant pleaded *nil debet*, and issue was thereupon submitted to a jury at the December term, 1842: Read, judge, presiding.

The plaintiff introduced a bill single made and endorsed as set forth in the declaration, and the protest of Alpha Kingsley, notary public, endorsed as follows: "20th July, 1839. I put notices of this protest in the postoffice at Nashville, addressed to P. M. Miller and A. B. Bradford, Jackson, Tenn." The deposition of Kingsley was read. He stated, that he was notary

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public in the city of Nashville; that on the 20th day of July, 1839, there came into his hands, as notary public, the bill single above described; that he duly presented said bill single for payment; that it was not paid, and that he thereupon protested the drawer and endorsers, and on the same day (20th) deposited notices in the postoffice at Nashville, addressed to Bradford and Miller, at Jackson, Tenn. in time to go by the first mail leaving Nashville after said demand and protest; that he addressed the notice to Bradford at Jackson because he had previously transmitted several notices of protest to him at that place, at which Bradford then resided, and that he knew that he continued to reside there, from the statements made to him by Bradford the last time he saw him, and that previous to July, 1839, he had not heard of the removal of Bradford from Jackson.

The defendant introduced testimony showing that he removed from Madison county, Tennessee, to Holly Springs, Mississippi, on the 9th or 10th of March, 1839; that his removal was generally known; that he was major-general of the militia of the western division of the state; that on the 12th of February, 1839, he published in the Jackson Telegraph his resignation of this office and his intended removal; that about forty numbers of the Jackson Telegraph were sent to subscribers residing in the town of Nashville, amongst others to three of the leading directors of the Planters' Bank; that the governor of the state issued a proclamation, which was published in the Nashville Whig, directing the election of a successor; that several of the directors of the bank took the Whig at the time of the publication of this proclamation; that Bradford was well known in Nashville; that his removal was known to many persons in Nashville.

Kingsley, whose deposition was taken by defendant, stated that the last time he saw the defendant Bradford was in February, 1838.

Hobson, the cashier of the Planter's Bank, testified that he did not know of the removal of Bradford at the time the notice was transmitted, nor did he know that any of the directors of the bank did.

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It appeared that Nashville and Jackson were distant from each other about 150 miles; that a tri-weekly stage ran between them, and that there was much intercourse between the inhabitants of the two places.

The defendant offered a witness to show that the signature of P. M. Miller, the prior endorser, was a forgery. This evidence was rejected by the court.

The charge of Read, presiding judge, is set forth in the opinion of the court which follows.

The jury rendered a verdict for the defendant. A motion for a new trial was made, and overruled; judgment rendered, and plaintiff appealed.

*McLanahan* for plaintiff. The question in this case is, was there a proper exercise of diligence in sending the notice, to fix the liability of defendant as endorser. Should the notary, who believed he knew as well where Gen. Bradford resided as any man in Nashville, have made enquiry as to his place of residence? Diligence is only necessary in such cases where the holder knows, or ought to know, that there is occasion for the exercise of it. 3 Wend. Rep. 410. The holder in this case certainly did not know that there was any occasion for the exercise of diligence. Ought he to have known it? Had he any right to suppose that a man who had resided for a number of years in Jackson and had filled many important offices in the state, had quit his home for another? It seems that it would, in the absence of some information on the subject, be a very unreasonable supposition.

Suppose the note had been presented by some other notary public in Nashville, who really did not know the residence of the endorser, and he had gone to Alpha Kingsley and enquired, and Kingsley had informed him that Jackson was the place. Would not that have been sufficient? It certainly would. Mr. Kingsley was an old acquaintance, and would have been presumed to know where the endorser resided. If another could rely upon his information without the imputation of negligence, why could he not rely upon the same information himself? Due diligence in the eye of the law is such precaution and attention

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as a reasonable man would ordinarily exercise in the management of his own affairs.

The fact that some of the directors were subscribers to newspapers that published the removal of defendant, is entitled to no weight as evidence. See 2 Hum. Rep. 112.

Notice to a director as an individual, would not bind the corporation. 4 Paige's Rep. 136; 14 Mass. Rep. 61; 22 Pickering's Rep. 35; 24 ib. 276.

If the holder of a negotiable instrument use due diligence to ascertain the residence of endorsers, it is sufficient to bind them, though notice is sent to a place other than their residence. 1 Johns. Rep. 296; 9 Yer. Rep. 254.

*A. O. W. Totten* for defendant. No diligence whatever was used to learn the residence of defendant, and the plaintiff's case rests solely on the belief of the notary that defendant still resided at Jackson, and this belief was predicated on information received sixteen months before the protest. But the proof shows most conclusively, that with even the slightest diligence the notary could have learned the defendant's residence; that several of the directors of the bank, whose agent he was, could have informed him; the keeper of the Inn, known by the notary to be the defendant's boarding house, and numerous others, the principal citizens of Nashville, could have given the desired information. The notary alone seems to have been ignorant of defendant's residence, which was known to almost every one besides. His change of residence had acquired a degree of notoriety, by reason of the facts stated in the proof, unequaled, perhaps, in any other instance of removal from the state.

The holder of a bill or note is excused for not giving regular notice of its dishonor to the endorser, "*of whose place of residence he is ignorant, if he use reasonable diligence to discover where the endorser may be found.*" Chitty on Bills, 487, margin. "Ignorance of the residence may excuse notice, but reasonable diligence must be used to obtain knowledge." 3 Camp. 262; Chitty on Bills, 488, margin. As to what is reasonable diligence in such cases, *vide* Chitty on Bills, 487, note k; *ib.* 488, note 1; 12 East, 433; *Chapman v. Lipscomb*, 1 J. R. 294;

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*Bank of Utica v. Demott*, 13 J. R. 432; *Bank of Utica v. Philips*, 3 Wend, 416. The cases decided in this State having reference to this question, are, *Marsh v. Barr*, Meigs, 68; *Nichol v. Bate*, 7 Yer. 305; *Dunlap v. Thompson*, 5 Yer. 67; *Davis v. Williams*, Peck, 191. The cases of the *Bank of Utica v. Philips*, and *Dunlap v. Williams*, were cases of removal after the paper was endorsed, and are in many other respects widely distinguishable from the case before the court: and all the cases do require the exercise of diligence to excuse notice, and fully sustain the principle first assumed.

Where the drawer has removed from where the instrument represents him to reside, or where he resided when it was drawn, the holder is bound to use reasonable diligence to find out the place to which he has removed; and if he succeed, to present it for payment, to charge the endorser. 3 McCord, 394, cited in 1 Chitty on Bills, 488, note 1.

2. Due diligence is a mixed question of law and fact; but whether due diligence has been used to discover the residence of the endorser, is a question of fact for the jury; and that is the very question which they have determined in this case, as the charge of the judge left the whole matter to the jury. 12 East, 433, cited in Chitty on Bills, 487, note k; 10 Peters's R. 588; *Nichol v. Bate*, 7 Yer. R. 309.

GREEN, J. delivered the opinion of the court.

This is an action brought by the Planters' Bank against A. B. Bradford, as the endorser of a bill single drawn by W. B. Miller and payable at the Planters' Bank at Nashville. Notice of non-payment was sent to Jackson, Tennessee, in due time. But Bradford had removed his residence from Jackson, to Holly Springs, Mississippi, about five months before the note fell due, and was a resident of Holly Springs at the time said endorsement was made. Bradford was well known in Nashville, and the notary who gave the notice knew him personally; and feeling confident that he knew Bradford's residence to be at Jackson, he made no enquiries as to his place of abode. He did not know of Bradford's removal; and Bradford had told him, six-

[*Planters' Bank vs. Bradford.*]

teen months before the note fell due, that Jackson was his residence. Bradford had resided many years in Jackson, was major-general of militia at the time of his removal, and when he removed, published an address to the people stating his removal to Holly Springs as the cause of his resignation; and the governor published a proclamation, directing an election for a successor. The newspapers containing these publications were received by many persons in Nashville, and by several of the directors of the bank. There is considerable communication between Nashville and Jackson, the places being distant one hundred and fifty miles, and a tri-weekly mail stage regularly passing between them. Bradford was settled at Holly Springs immediately after his removal from Jackson, as a practicing lawyer, and his residence there was well known in the surrounding country and was known by many persons in Nashville. The court charged the jury, that the holder of negotiable paper must demand payment when it falls due, and forthwith notify the endorser of the nonpayment; that notice sent by mail, addressed to his nearest postoffice, would be sufficient, and that it must be so addressed, unless the holder had a reasonable excuse for not doing so. A reasonable excuse would be, that the endorser had a fixed residence at a particular place, known to the holder or agent, and had removed so recently, or so privately, that such holder or agent could not be reasonably supposed to have notice of his removal; or if the holder or agent used due diligence in making enquiry as to the residence of the endorser, and could not ascertain it, and therefore directed the notice to his last place of residence; that upon these principles the jury must determine whether the holder in this case used due diligence. The jury found for the defendant, and the court refused a new trial, and the plaintiff appealed to this court. The only question now for consideration is, whether the plaintiff used due diligence to give the defendant notice. The defendant's residence had been at Holly Springs for five months before the note fell due, and that was his domicile at the time he endorsed the note. There has been unusual publicity attending his removal from Jackson to Holly Springs. He had been a general of militia for the western division of the state, and a proclama-

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tion for the election of a successor was published in the papers, and the election to supply the vacancy occasioned by his resignation had taken place. A popular election, agitating the entire western division of the state, would be likely to attract attention at Nashville, and to elicit enquiries as to the circumstances which brought it about; and this would lead to a knowledge of the resignation and removal of the defendant.

Upon the whole, we think the holder and its agent were culpably negligent in relation to the transmission of notice in this case. The notary had heard the defendant say, sixteen months before the note fell due, that he resided at Jackson, and he acted upon this knowledge without enquiry. Now, if he had not known the residence of the endorser, and had made enquiry of one man only, by whom he had been told that the endorser had lived in Jackson sixteen months previously, but that he knew nothing of him since, and upon such information notice had been sent to the wrong place, no one would hold such enquiry to have been due diligence. But we do not perceive that the case is different, where a party acts upon his own knowledge, which is equally imperfect. It is a reasonable presumption, that men at Nashville, engaged in trade, dealing largely in negotiable paper, protesting many notes and notifying many endorsers, would, under all the circumstances of this case, have been informed in relation to Bradford's residence; and the failure to obtain such knowledge, is evidence of negligence, the consequence of which they must suffer, rather than that the endorser should bear it, who by reason of that negligence failed to receive notice. Judgment affirmed.

## HOPKINS vs. TOEL's heirs.

1. A locative interest in land is an equitable, and not legal interest: and therefore cannot be noticed in an action of ejectment.
2. The statutes of this State, authorizing partition of real estate, apply to the owners of legal, and not equitable estates; and therefore partition cannot be made of a locative interest, where the locator has acquired no title by conveyance, or by bill under the act of 1829, ch. 84.

This action of ejectment was brought by Toel's heirs against Hopkins, in the circuit court of Weakley county, in February, 1842. Plea, not guilty. It was submitted to a jury at the February term, 1843: Harris, judge, presiding. Howard located seven hundred and fifty acres of land for Peter Toel, in Toel's name; and sold his undivided locative interest (182 $\frac{1}{4}$  acres) to Billingsly and executed to him a bond for title, and Billingsly took possession for himself and Toel. Billingsly sold and conveyed the locative interest to Hopkins, the defendant, in 1832, and gave Hopkins possession of the whole tract in the same way. This deed was made in December, 1834. In March, 1837, Hopkins obtained an order for the division of the land: the land was divided. The judgment, or order of division, recited that Hopkins was the owner in *fee simple* of the undivided fourth part of the tract. The whole tract was reported, for the nonpayment of taxes, but not in the names of the true owners. It was sold, and Hopkins became the purchaser; saying that he knew the sale was not valid, but that he intended to keep off intruders.

The judge charged the jury that the defendant had no right which could be noticed in an action of ejectment. A motion for a new trial was made and overruled, and judgment rendered. The defendant appealed.

*Pavatt* for plaintiff in error.

*J. Williams* for defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of ejectment, in which the lessor of the



[Hopkins vs. Toel's heirs.]

plaintiff in ejectment claims title by virtue of a grant from the state of Tennessee to Peter Toel, No. 2699, bearing date 8th day of January, 1835, for seven hundred and fifty acres of land. This grant covers the premises in dispute. Defendant claims title under a deed of conveyance from one Elijah Billings, which purports to convey to him one hundred and eighty-two and three fourths acres of land, the same being the equal undivided fourth part of the land granted as above to Peter Toel, it being the locator's interest therein, and purchased by Billings from M. H. Howard, the locator, from whom a bond for title was taken. This deed bears date the 9th day of December, 1834. Billings, under his purchase from Howard, took possession of the whole tract granted to Toel, and held the same jointly for himself and Toel, and he put the defendant Hopkins into possession in the same way, who has continued in possession up to the time of bringing this suit, which was the second Monday in February, 1842, a period of more than seven years.

At the March term, 1837, of the circuit court of Gibson county, John Hopkins, the defendant in ejectment, filed his petition, alledging that he was the owner of the one undivided fourth part of said tract of land, and the heirs of Peter Toel of the balance, and asking to have the same laid off to him in severalty, which was done by metes and bounds, under a commission issued by order of said court upon said petition on the 22d day of June, 1837. On the 6th day of July, 1840, Hopkins purchased the tract of land at a tax sale, and took a sheriff's deed for the same. This sale was made upon a report which is not made according to law. Upon the trial, the court charged the jury, "that inasmuch as the defendant had produced no conveyance from Toel's heirs for the locator's interest, that though he had an equitable title, yet he could not avail himself of it on this trial; and the circumstance of the circuit court having recited in the decree of partition, that it appeared to the satisfaction of the court that the defendant was entitled to a portion of the land in fee simple, could not avail him," and that he acquired no title by virtue of the sheriff's deed upon the tax sale.

A verdict and judgment were rendered for the lessor of plaintiff, upon which defendant prosecutes his writ of error. That

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the defendant acquired no title by the partition made by the order of the circuit court of Gibson county, is very clear. A partition can only be made between joint owners in a legal right, and not equitable. A locative interest is an equitable, and not a legal right; and by the act of 1829, ch. 84, (page 113 of Hay. & Cobbs), locators of land south and west of the congressional reservation line may file their bills in chancery against the owners of land located, to have their locative interest decreed to them: when this is done, their legal right accrues, and then, and not till then, (unless it be conveyed without suit,) can they apply for partition under our statutes. The defendant does not occupy this position, and therefore has acquired no right to any portion of the disputed premises which can be noticed in an action of ejectment. That the sale for taxes and the deed of conveyance thereon are void, is not controverted, and cannot be. That the defendant's possession cannot avail him, is equally certain; for it cannot be pretended to have been adverse to the plaintiff's right, until the partition was made, which was in 1837; and the suit being brought in 1842, seven years did not elapse; so the statute of limitations is no bar.

Upon the whole, we are of opinion, that the defendant is without defence in the action, and has no remedy but in a court of chancery. Judgment affirmed.

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ANDREW HART *et als.* vs. M. D. FIZER.

1. Connell, a justice of the peace, rendered a judgment against Hart. Another justice of the peace for the same county, issued a *ca. sa.* thereupon. Held, that in the absence of proof, it will be presumed that this is one of the specified cases in which one justice of the peace was authorized to issue process on judgment rendered by another, and that the *ca. sa.* was regularly issued.
2. There are three cases in which a justice other than he who renders the judgment may issue an execution—1st, in case of vacancy—2d, absence of the justice for three months from his district—3d, temporary absence.
3. The principles of the case of *Street v. Vanderpool*, and *Gallaher v. S. & M. 2 Humphreys*, recognized.

Judgment was rendered at the March term, 1843, of the circuit court of Dyer county in favor of Fizer against Hart

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and his sureties, on a *ca. sa.* bond: Harris, judge, presiding. The defendants appealed.

*Sampson*, for plaintiff in error.

*Hill*, for defendant in error.

TURLEY, J. delivered the opinion of the court.

On the 26th day of July, 1842, M. D. Fizer recovered a judgment before T. Connell, a justice of the peace, against Andrew Wait, for the sum of \$158 33, upon which a writ of *fi. fa.* was issued on the 6th day of August, 1842, and returned on the 27th "no property found." On said last mentioned day a *ca. sa.* was issued upon said judgment, by John C. North, a justice of the peace for the same county, which was executed on the same day and bond taken in the usual form for defendant's appearance at the next term of the circuit court of Dyer county, with John Hart and Mark Spencer his sureties. At the February term of said court, 1843, the parties appeared by their attorneys, and defendants in the bond moved the court to quash the proceedings, upon the grounds that the *ca. sa.* was issued before the return of the *fi. fa.* and that the *ca. sa.* was issued by a justice who did not render the judgment; and proposed to prove that Connell, the justice who did render it, was not absent from Dyer county for three months. The judge refused to quash the proceedings, and the defendant failing to comply with the conditions of his bond, judgment was given against him and his sureties. In this we think there was no error. The *fi. fa.* was returned on the 27th day of August, and the *ca. sa.* issued on the same day. The return of the first may have well been and no doubt was prior in time to the issuance of the *ca. sa.* By the act of 1835, chap. 17, sec. 15, if the office of a justice of the peace become vacant, his books and papers shall be deposited with his successor, and until a successor be elected, with the nearest justice; and if any justice shall absent himself from his district for three months together, he shall deposit his books and papers with the nearest justice; and in both

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instances it is the duty of the person into whose possession such books and papers may come, to act upon them until the vacancy is supplied in the one instance, or the justice returns in the other: the same law also provides, that any justice of the peace may issue an execution upon any judgment rendered by any other justice of the same county, whenever the justice rendering the judgment is temporarily absent, under the same rules and regulations that govern the justice who rendered it. Now, here are three cases specified in which a justice may issue process upon a judgment rendered by another: 1st. In case of vacancy in the office, till filled by the election of a successor: 2d. Absence of the justice for three months from his district, till his return: 3d. Temporary absence, during such absence. Under which of these, this execution was issued, does not appear. In the absence of proof to the contrary, the presumption is, that the process was regularly issued. The offer to prove that the justice was not absent from his district for the space of three months, if it were admissible, would not have shown that there was no temporary absence, nor vacancy in the office by death or resignation. But we think this proof on the motion to quash was inadmissible: the party complaining of the irregularity of the process should have filed his petition in the circuit court, setting forth his grounds of objection thereto, and asked it to be superseded and quashed; and he comes too late with his motion upon matters *de hors* the record after he has given bond and security to pay the debt, or take the benefit of the insolvent laws. Judgment affirmed.

**WINCHESTER vs. WINCHESTER.**

The certificate of a Notary, that he gave due notice to an endorser, is not admissible evidence, unless it be made at the time of the protest, and be made "in or on the protest."

On the 19th day of December, 1840, M. B. Winchester drew a bill of exchange on Handy, of New Orleans, for \$1500, payable four months after date, to W. Winchester. It was protested for non-acceptance, and an action of assumpsit was instituted in the Circuit Court of Shelby county, by W. Winchester against the drawer, M. B. Winchester. The defendant pleaded non-assumpsit, and the case was submitted to a jury, Dunlap, Judge, presiding, at the February term, 1843. The plaintiff read the bill of exchange and the protest for non-acceptance; he also offered to read to the jury a certificate written on the protest by the Notary, which set forth, that he presented the draft for acceptance on the 23d January, 1841, that it was protested for non-acceptance on the said day, and that he notified M. B. Winchester by letter addressed to him at Memphis, Tennessee, and deposited in the post office at New Orleans on the same day of the protest, in time to go by the first mail after the protest.

This certificate was endorsed on the protest on the 28th day of April, 1842.

The presiding judge being of the opinion that the act of 1820, ch. 25, sec. 4, was not complied with, the said endorsement not having been put on the protest at the time of the protest, rejected the evidence, and a verdict was rendered for the defendant. A motion for a new trial was made and overruled, and the plaintiff appealed.

*Barry & Leath*, for the plaintiff.

*W. T. Brown & Stanton*, for the defendant.

**GREEN, J.** delivered the opinion of the court.

This suit is brought by the payee against the drawer of a bill of exchange. On the trial of the cause in the Circuit Court,

[Winchester vs. Winchester.]

the plaintiff read in evidence the protest of William Christie, a Notary Public of New Orleans, for the non-acceptance of the bill, dated the 23d of January, 1841; and offered to read the certificate of said Notary, dated the 8th April, 1842, that he had addressed a notice to the drawer at Memphis, and deposited it in the post office at New Orleans on the said 23d of January, 1841. To the reading said certificate the defendant objected, and the court sustained the objection and refused to permit said certificate to be read, to which the plaintiff excepted. The jury found a verdict for the defendant, and the plaintiff appealed to this court.

The act of 1820, ch. 25, sec. 4, (Car. & Nich. 503,) provides, "That when a bill of exchange, promissory note, or writing obligatory, shall have been duly protested by a Notary Public for non-acceptance or non-payment, and the Notary shall have certified either in or on his protest, that he has given notice of demand of payment and refusal, or the dishonor of such bill, promissory note, or writing obligatory, to the endorsers, makers, or others concerned, such protest shall be *prima facie* evidence of the fact of notice." This act provides that the certificate of notice shall be evidence when it is made *in* or *on* the protest, and constitutes part of the transaction at the time the protest is made. For it says, that the certificate thus being made, the *protest* shall be *prima facie* evidence, showing that such certificate must be incorporated in the protest as part of it, or be upon the same ~~paper~~ containing the protest, so as to constitute a part of it, and thus be included in the general expression of the act, that "such protest shall be *prima facie* evidence of notice."

In the present case the certificate of notice does not constitute part of the protest, not having been placed on the protest at the time it was made, but was made out as a separate document more than a year after the protest was made, stating the facts that did occur at the time of making the protest. It is not embraced either in the words or meaning of the statute, and was, therefore, properly rejected. Affirm the judgment.

## DAVIS vs BECKHAM.

Notice of protest to the endorser may be good, though directed to the wrong post office, if it appear that due diligence had been used for the purpose of ascertaining the endorser's nearest post office. Yet where the notice was directed to a post office which had been discontinued for twelve months and more before the notice was given, it was held, that this was evidence of negligence in that respect, and discharged the endorser.

Davis instituted an action of assumpsit against Beckham in the Circuit Court of Obion county, on the endorsement of a promissory note payable at the branch of the State Bank at Trenton. Defendant pleaded non-assumpsit, and the case was submitted to a jury at the October term, 1841, who returned a verdict for defendant. The court set the verdict aside, and the cause was transferred by consent to the Circuit Court of Gibson county, and was again submitted to a jury at the July term, 1842.

It appears that Rains executed his note on the 25th November, 1840, payable to Beckham six months after date at the branch of the State Bank at Trenton, and that Beckham endorsed and delivered it to plaintiff, Davis. When the note fell due, demand was made and it was protested for non-payment.

The Notary Public endorsed on the protest these words, to wit; "On 28th day of May, 1841, I deposited in the post office at Trenton, Ten., a notice of the within protest, addressed to B. Beckham as endorser, whose residence is at this time in Obion county, and upon strict enquiry of various persons, I find the nearest post office to his residence to be at Obionsville, Obion county, Ten., to which place I have directed a notice to him." Hogg, the Notary, was sworn and stated, that he did not know where Beckham's nearest post office was; that he called at Grigsby's, who was a relative of the defendant's, twice, and that he called at the post office in Trenton and could get no information where to send the notice. He called on the mail carrier from Trenton to Mills' Point, who told him that Obionsville was the nearest post office to defendant; that he had been at Obionsville and knew where Beckham lived, and that he (the Notary) directed the notice accordingly.

The defendant proved that there had been a post office at

[*Davis vs. Beckham.*]

Obionsville, and that it had been discontinued more than 12 months before the maturity and protest of this note. He also proved by the Post Master at Trenton, that the public and usual route to the defendant's neighborhood was by the way of Johnsville, a post office on the road between Trenton and Beckham's neighborhood; that Johnsville was the nearest point to Beckham's, and that he should have addressed him there. It was further proved, that letters were addressed to defendant at Johnsville after the date of the notice.

Harris, the presiding Judge, charged the jury, that to make the endorser of the note liable it was necessary that the holder or his agent the Notary should use due diligence to give the endorser notice of the protest; that the post office was a proper medium through which to send this notice, where the endorser did not live in the county, as in this case; that as a general rule the notice should be sent to the nearest post office; but if not known, then the holder or Notary should use due diligence to learn the nearest post office, and to send the notice to such post office; and if the notice, after the use of due diligence, was sent to a more distant post office, yet this would be sufficient notice to bind the endorser. The court further charged the jury, that if the notice was directed to a place where there was no post office, and where there had been none for six, twelve or eighteen months before the date of the notice, this would be evidence of a want of due diligence.

The jury returned a verdict for the defendant. A motion for a new trial was made and overruled, and the plaintiff appealed in error.

*Claiborne*, for the plaintiff in error.

*Totten*, for the defendant in error.

GREEN, J. delivered the opinion of the court.

In this case notice of non-payment was sent to an endorser, directed to a place where there was no post office at the time. The court told the jury, that if notice was directed to a place



[Stanly & Harris vs. Daily.]

where there had been no post office for six, twelve or eighteen months before the date of the notice, this would not be due diligence. We think this charge correct; although a notice directed to the wrong post office may be good, if due diligence have been used to ascertain the right one, and the party is informed that the one to which he directs it is the nearest to the endorser; yet if a post office have been discontinued as long as six or twelve months, that fact is evidence that due diligence was not used.

We are not prepared to say, that if upon diligent enquiry a party is informed that there is a post office at a particular place, and directs a notice there, and it afterwards turns out that it had been but recently discontinued, such notice would not be sufficient. But the length of time the post office had been discontinued in this case, furnishes evidence of the *want* of diligence. Affirm the judgment.

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STANLY & HARRIS vs. DAILY.

The act of 1823, ch. 10, sec. 1, barring a right of action against the sureties of any sheriff, coroner or constable in three years, if suit be not brought, does not extend to the default of such officer in making an insufficient return, or no return of an execution. It extends only to cases where the officer by his return furnishes record evidence that the execution has been satisfied.

Daily, in the name of the Governor, instituted an action of covenant against Stanly and Harris, the sureties of Stilborn, a constable, in the Circuit Court of Perry county, on the 3d day of January, 1842. They pleaded the statute of limitations, (act of 1823, ch. 10, sec. 1,) and the case was submitted to a jury, Totten, Judge, presiding, at the January term, 1843.

The plaintiff produced the receipt of the constable, executed to W. Shepperd, acknowledging the payment of the sum of \$80 by Shepperd to him on a judgment recovered by plaintiff, Daily, against said Shepperd. This receipt was dated 20th October, 1838. This was all the evidence.

The Judge charged the jury, that the act of 1823, limiting

[Stanly & Harris vs. Dally.]

suits against the sureties of sheriffs, coroners and constables, applied only to cases where the officer has returned the process satisfied, and not to cases of false or insufficient returns, or a failure to return.

The jury rendered a verdict for the plaintiff. A motion for a new trial was made, overruled, and judgment rendered, from which the defendants appealed.

*Pavatt*, for plaintiffs in error.

*Allen*, for defendant in error.

REESE, J. delivered the opinion of the court.

This is an action of covenant brought upon a constable's bond against his sureties for the official default of their principal, in failing to pay over monies collected by process in his hands. The defendants pleaded the statute of limitations of 1823, ch. 10, sec. 1, (Nic. & Car. 444,) which provides, that when any execution or other process shall be put in the hands of any sheriff, coroner or constable, and he shall return that the money is made on said execution, "it shall be the duty of him entitled to the money to commence suit therefor within three years after the end of the term of the court to which the execution was returned, or within three years from the return of the execution, should judgment be had before a Justice of the Peace or other tribunal, if a citizen of the State, and four years if not a citizen of the State. And if the person entitled to claim the money made on said execution, should neglect or fail to proceed in the time aforesaid, his right to recover the same of the sureties of said officers shall be forever barred."

The court upon the trial, with regard to this statute, charged the jury, that it applied to cases only where the officer by his return shows the money to have been made on the process, and that it does not apply in cases of failure to return, or of insufficient or false return. The only question in the case before us, is whether this charge is correct. And we think the construction of the court upon the statute, founded as it is upon

[Frost vs. Rucker &amp; Payne.]

its very words and its obvious and plain meaning, is not only beyond all question correct, but, from the nature of the case, scarcely admits of aid from argument or illustration. Before the enactment of the statute, the sureties of the officers in question were liable, as in other cases at common law, until absolved by the presumption arising from the lapse of time, namely, sixteen years or more.

What is the extent of the change made by the statute?

It is where there is record evidence furnished by the officer, the principal in the bond himself, that he has the money in his hands, and this evidence has for three years been in the power or knowledge of the plaintiff, and he omits during all that time to sue, he shall not afterwards sue or recover from the sureties. The *status* upon which the statutory charge of *laches* against the plaintiff is based, and upon which the bar arises, is limited to this, to wit, the actual return of the process to the tribunal issuing it with the official endorsement thereon, showing the same to be satisfied, and the lapse of three years after such return without the institution of suit.

This is the very case, and the only case put by the statute, and the remedy can be extended to no other case. It was not intended to be, and ought not to be. Let the judgment be affirmed.

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#### FROST vs. RUCKER & PAYNE.

The act of 1801, ch. 15, giving a remedy by motion to sureties on any bill, bond, note or obligation, against whom a judgment may have been rendered, does not embrace the case of a surety for stay of execution, who has satisfied such execution. The liability of a stayor of execution, springs from an act in the nature of a confession of judgment, and not from any note, bill, bond or obligation.

A judgment was recovered before a Justice of the Peace against Rucker and Payne. Frost stayed the execution, and at the expiration of the stay, paid the money; and thereupon made a motion for judgment against Rucker and Payne in the Circuit Court of Dyer county. Harris, the presiding Judge,

[*Frost vs. Rucker & Payne.*]

being of the opinion that the court had no jurisdiction to render judgment, overruled the motion and dismissed the case. The plaintiff appealed.

*Raines*, for Frost.

*Sampson*, for Rucker & Payne.

RESE, J. delivered the opinion of the court.

The plaintiff moved the Circuit Court for judgment against the defendants for the sum of fifty-nine dollars and forty-two cents, being the amount paid by him as surety for the stay of execution on a judgment rendered by a Justice of the Peace against the defendants. The motion was refused by the Circuit Court, upon the ground that it had no jurisdiction, in such a case, to render judgment in that summary manner. And the question before us is, whether this opinion of the Circuit Court is erroneous. We think it is not. The act of 1801, ch. 15, which gives this summary remedy to persons who are sureties in any note, bill, bond or obligation, has reference, we think, to the original contract, constituting the ground of liability upon which judgment is rendered against the principal and his surety. Judgment is not rendered against the stayor upon any note, bill, bond or obligation, or other pre-existing liability. The act of staying an execution is in the nature of a voluntary confession of judgment. It is not within the words of the act of 1801, ch. 15, and it has been invariably held, that these statutes, and all others conferring summary remedies, not according to the course of the common law, cannot, by construction, be so amplified as to embrace cases which, not falling within the words, might be supposed to come within the meaning and object of the enactment. That stayors of executions are not embraced by the provisions of the act in question, is shown by an act passed at the same session ch. 18, releasing sureties, unless plaintiff shall sue, when notified according to that act, and also by the act of 1809, ch. 69, authorizing a surety in "any note, bond, bill or obligation," against whom judg-

[*Vanhook vs. Story et als.*]

ment has been rendered, to move for judgment over against his principal upon the mere ground of the rendition of a judgment against him, and without payment of the money. It is obvious these statutes could not apply to sureties for the stay of executions; and yet, by the use of identical terms, it would seem they were intended to apply to all the classes of sureties comprised in the provisions of the act of 1801, ch. 15. And, finally, the act of 1835, ch. 41, sec. 1, 2 and 3, confers on the Justice taking the stay, the power to render judgment, in this summary manner, in favor of the surety against the principal. But we are aware of no statute which confers it upon the Circuit Court. We, therefore, affirm the judgment.

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*VANHOOK vs. STORY et als.*

1. A house was occupied as a school house by consent of Story, who claimed the right to the possession of the land on which it was situated. Before the termination of the school, Vanhook took possession of the house, declaring that if any person attempted to dispossess him, he would shoot him: Held, that this was a forcible entry and detainer; and if held after the termination of the school, it was a forcible detainer of the premises of Story, for which the writ lies.
2. Vanhook forcibly took possession of a school house. Story who claimed the right to the possession, and who was forcibly dispossessed, said if Vanhook had Carter's right, he had a right to the possession, but that he did not believe that he had Carter's right. Vanhook proved that he had Carter's right: Held, that these facts did not establish the assent of Story's mind to Vanhook taking possession; and if the possession was taken without such assent, it was forcible and unlawful.

On the 8th day of April, 1842, Story's heirs filed their petition in the office of the Clerk of the Circuit Court of Madison county, against Vanhook. This petition states, that they are the owners of a certain tract of land, which is described by metes and bounds, lying in Madison county, 10th district, range 1, section 10. They state, that Vanhook was guilty of a forcible entry upon the land, and then unlawfully detained it. That they were in possession of it at the time of the forcible entry and unlawful detainer, and request the issuance of process against Vanhook.

A summons was issued, and defendant notified to appear

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and answer. He appeared and pleaded not guilty. The issue was submitted to a jury at the August term, 1842, Read, Judge, presiding, and a verdict returned, that the defendant was guilty of an unlawful detainer. A motion was thereupon made for a new trial by defendant, which was overruled, judgment rendered, and defendant appealed.

The facts of the case, and charge of the court, are stated in the opinion of the court.

*McLanahan and Scurlock*, for the plaintiffs in error.

*Gibbs, Ewell and McLellan*, for the defendants in error.

This in an action for a forcible detainer, brought by the Storys against the plaintiff in error, Vanhook. It appeared in evidence, that the premises had been long in the possession of the father of the plaintiffs below; that he had agreed, verbally, to let the neighborhood have an acre of his land for a school house, and that a house was built, and a school taught therein. The plaintiffs, after the death of their father, refused to ratify the contract, and requested the patrons of the school to remove the school to some other place, but afterwards agreed to permit the school to continue for the time. After the teacher had dismissed the school on Thursday evening, having fastened the door by putting a bench against it, the plaintiff in error drove his wagon up to the door of the school house, took out his goods and placed them in the house, and with his family took possession thereof. He declared that day, that he would shoot any one who should attempt to put him out, and he continued in possession until this suit was brought. The defendant proved, that on Friday evening, while he was in possession of the house, Otey Story, one of the plaintiffs, said to Vanhook, that his father never denied that Martha Carter had a right to the land, and that if Vanhook had her right, he had a right to come in, but he did not believe he had her right. The defendant read in evidence a deed of quit claim from Martha Carter for the land, including the house in question.

The court charged the jury in substance, that if the land was

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occupied as a school house, it would be in possession of the teacher, and not of the Storys, and that while thus possessed a forcible entry into it would not entitle the Storys to recover for a forcible entry; but, that if upon the termination of the school, the plaintiffs were entitled to possession, and the defendant continued to hold the possession against their will, in such way as that their possession could not be regained without a breach of the peace, he would be guilty of a forcible detainer; and that written notice to him to quit was not necessary. The jury found the defendant guilty, and he appealed to this court.

It is now insisted for the plaintiff in error, that Vanhook was in possession by the consent of the Storys claiming title for himself, and that they, therefore, cannot dispossess him. But the facts, as set forth in this record, do not justify the conclusion, that the Storys either consented that Vanhook should *take* possession, or that he might retain such possession after it had been taken.

There is no question as to the violence and force employed by Vanhook, to obtain possession of the school house. But it is said Story afterwards agreed that he was rightfully in possession, when he said he had never disputed Martha Carter's right, and that if "Vanhook had her title, he had a right to the possession, but that he did not believe Vanhook *had* her right." It is supposed that this declaration, coupled with the facts that Vanhook had acquired, by quit-claim deed, Martha Carter's interest in the land, establishes the assent on the part of Story to the rightful possession of Vanhook. But this is a mistaken inference from these facts. Now, although one of the Storys said, that Martha Carter had a right to the possession, and that if Vanhook had her title, *he* had such right, yet he added, that he did not believe Vanhook had Martha Carter's right. He plainly here disputes Vanhook's right to the possession, upon the ground, that he did not believe Martha Carter's right was vested in him; and though Vanhook might show that Story was mistaken still the proof of such mistake would not change the state of Story's *mind*, and make it assent to a proposition, in relation to which he had expressed the strongest dissent.

We think the jury were fully justified in finding Vanhook

[Williams vs. Lowe.]

guilty of a forcible detainer; and as there is no error in the charge of the court, the judgment must be affirmed.

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WILLIAMS vs. LOWE.

1. A contract of sale made by a fraudulent vendor and fraudulent vendee, binds the parties, and vests the title to the property sold in the vendee. The statute of frauds makes the contract void as to the creditors of vendor only.
2. The lien of a *f. fa.* does not bind goods, the title of which is not in the execution to debtor, and as a *bona fide* purchaser from a fraudulent vendee, takes the property discharged of the operation of the statute of frauds, the lien of a *f. fa.* cannot attach to it upon the assumption that it continued, by the statute of frauds, the property of the original fraudulent vendor.

Trover for a horse by Lowe against Williams, in the Circuit Court of Obion. Plea not guilty, and issue. It was submitted to a jury at the June term, 1842, Harris, Judge, presiding. Verdict for the plaintiff for \$40. There was a motion for a new trial overruled. Judgment rendered on the verdict, and the defendant appealed. All the material facts and the charge of the Judge are set out in the opinion of the court.

*Raines*, for the plaintiff in error.

*Harris*, for the defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action to recover the value of a horse. The defendant in error traded the horse in January, 1842, with one Stephen Campbell, who was in possession of, and claimed title to this property. The horse was levied on as the property of Archibald Campbell, by virtue of an execution in favor of Wm. W. Brown against him for \$52 39 $\frac{1}{4}$ , tested of the October term, 1841, of the Obion Circuit Court, and issued the 11th of November, 1841. The horse was sold the 11th February, 1842. Evidence was introduced, conducing to prove that the horse belonged to Archibald Campbell, and that he had given or sold



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him to his son Stephen Campbell, to defraud his creditors, and that at the time Lowe traded with Stephen Campbell for the horse, he was liable to be seized by virtue of Brown's execution as the property of Archibald Campbell.

The court charged the jury, "that if the creditor neglected to have the property seized while in the possession of Stephen Campbell, he could not reach it in the hands of a third person, if that person was an innocent purchaser, and had no participation in the fraud, if any existed." We think the court stated the law correctly on this point. It is not contended that the property is liable in the hands of an innocent vendee, by virtue of the statute of *frauds*, although it may have been purchased from a fraudulent vendee; but it is insisted that the horse, by reason of the fraud between the father and son, is to be regarded as the property of Archibald Campbell, and as the execution was a lien on his goods from its teste, that lien operated on this horse as though Stephen Campbell had no claim to him, and consequently overreached any right the plaintiff could acquire from Stephen Campbell. This proposition cannot be maintained. The contract between a fraudulent vendor and vendee, is good as to *themselves*, and vests the title to the property in the vendee. The statute of frauds makes the sale void as to creditors, but there is no lien upon goods, the title to which is in other persons than the execution debtor, although that title may be divested in favor of creditors by force of the statute of frauds; consequently if the fraudulent vendee sell to a *bona fide* purchaser, as he takes the property discharged of the operation of the statute of frauds, no lien can attach to it upon the assumption that it was by the statute of frauds the property of the original fraudulent vendee. But the judgment must be reversed, because the evidence in the bill of exceptions, does not show that Williams, though plaintiff in error, has any connection with the horse: his name is not mentioned or alluded to in the proof, and it is stated that the bill of exceptions contained all the evidence. Let the judgment be reversed.

**W. & R. C. PATTERSON vs. COLEMAN.**

- 1, The act of 1829, ch. 11, sec. 1, gives to the sheriff a remedy by motion against his deputy and sureties, upon ten days notice, when he shall have "become liable to pay money for the default or misconduct of his deputy:" Held, that a just construction of this act requires that the default or misconduct of the deputy should be judicially ascertained before the sheriff shall have his remedy.
2. A notice given before default ascertained, is, therefore, premature; but if the deputy appear after judgment is rendered against the sheriff, the court would be authorized then to render judgment against the deputy.

This is an appeal in error from the Circuit Court of Perry county, where judgment was rendered by motion, (Totten, Judge,) presiding, against Patterson, deputy sheriff, and his surety.

*Pavatt*, for Patterson.

*Allen*, for Coleman.

REESE, J. delivered the opinion of the court.

Coleman was sheriff of Perry county, Wm. Patterson was his deputy; and to indemnify the sheriff as to his official conduct, had entered into bond with Robert C. Patterson as his surety. An execution at the suit of the Bank of Tennessee came into the hands of the deputy sheriff, upon which he returned, merely, not satisfied. For this insufficient return the Bank served Coleman, the principal sheriff, with notice, that it would move against him at the January term, 1843, of the Circuit Court of said county. Upon being served with said notice, and before the meeting of said court or the rendition of any judgment against him, Coleman caused notice to be served upon Patterson and his surety, that at the next term, and upon the same ground, he would move against them for a judgment for the amount of the Bank's execution. Judgment, on motion, was rendered in favor of the Bank against Coleman, and on the same day, subsequently, there was judgment rendered in favor of Coleman against the Pattersons, which recited the preceding facts, and especially the rendition of the judgment against Coleman on that day. The Pattersons appeared by

[Patterson vs. Coleman.]

their attorney, and resisted the motion; and the question here is, was the judgment against them correct? The act of 1829, ch. 11, sec. 1, (N. & C. 670,) gives to the sheriff the remedy by motion against his deputy and the surety, upon ten days notice, when he "shall have paid money, or become liable to pay money for the default or misconduct of the deputy." What is the proper construction of this act of the legislature? Does it require this default or misconduct of the deputy, and the liability of the principal sheriff therefor, to have been judicially ascertained and determined before the sheriff shall have his remedy by motion against the deputy. We are clearly satisfied that it does. It could never have been the intention of the legislature, in the absence of all proceeding against the principal sheriff, and when none might ever take place, to permit him to move against the deputy for any default which he might be able to discover. The object was to give him a prompt and speedy remedy for his indemnity. But to entitle him to this indemnity, it must have been judicially determined that he was liable for the default or misconduct of the deputy. The notice then in this case was prematurely given; and but for the appearance of the defendants the court would not have had jurisdiction to pronounce judgment. But as the defendants did appear, rendering the notice immaterial and unnecessary, and as at the time of the judgment, as the judgment itself recites, there had been judgment against the principal sheriff, and his liability for the default and misconduct of the deputy was then judicially determined, we are of opinion that the judgment in this case must be allowed to stand. And we, therefore, affirm the same.

INGRAM *vs.* MORGAN, GARRETT, *et al.*

1. Morgan conveyed, with covenants of seizin, and right to convey, a certain tract of land, to which he had only a bond for title. At the time of sale and conveyance he did not communicate this fact to the vendee: Held, that good faith required that he should have informed the vendee of this fact, and the suppression of it amounted to a fraud on the vendee.
2. A covenant of seizin made by one who has no title, gives a right of action so soon as the covenant is made, and no eviction as in covenants of warranty is necessary; where the vendor is insolvent, a court of Chancery will enjoin the collection of the purchase money.
3. Where a note was delivered over without endorsement in discharge of a pre-existing debt, a promise made to the holder to pay it, made in ignorance of the failure of the consideration thereof, does not bind the maker.

This bill was filed in the Chancery Court at Sommerville, by Ingram against H. & J. H. Morgan and Garrett, to obtain a perpetual injunction against the enforcement of a judgment.

One Rivers, as administrator of Tyree Rhodes, deceased, sold a tract of land to H. & J. H. Morgan, and gave them a bond for title when the purchase money should be paid. The Morgans paid a portion, leaving the sum of \$1000 unpaid. In this state of the title and of the progress of payments, they sold the land to complainant. They gave him a deed which contained covenants of seizin, of right to convey, and of general warranty, and he took possession of the land. The Morgans did not communicate to Ingram the fact, that they had nothing but a bond for title, or that there was a balance of \$1000 of the purchase money unpaid; nor does it appear that Ingram was aware of these facts. The Morgans being indebted to Garrett, delivered to him one of the notes, without endorsement, in discharge of the debt. Ingram was notified by Garrett, that he had taken the note. Ingram in ignorance still of the state of the title, and of the non-payment of part of the purchase money, paid a portion of the note to Garrett, and promised to pay the balance: subsequently ascertaining the facts, he refused to pay the balance. The Morgans had become totally insolvent. Garrett, thereupon, instituted a suit in the Circuit Court of Hardeman county against Ingram in the name of H. & J. H. Morgan, for his use. A judgment was rendered against Ingram for the sum of \$800, and *fi. fa.* issued.

Ingram filed this bill in February, 1839, against Garrett and

[Ingram vs. Morgan, Garrett et al.]

Morgans. It was answered by J. H. Morgan and Garrett. Replications were filed and proof taken. In addition to the above stated facts, it appeared that the land belonged to Tyree Rhodes, and that he dying intestate the land descended to his heirs; that Rivers married one of the daughters of Rhodes, and had sold the land to the Morgans and taken the notes payable to the administrators of Rhodes; that the administrators of Rhodes had obtained judgment on one of the notes against the Morgans, and execution having been returned unsatisfied, a bill was filed by them to subject the land to sale for the satisfaction of the unpaid balance of the purchase money, and offering a deed when the money should be paid.

The cause came on to be heard before Chancellor McCambell, at the November term, 1842. He perpetuated the injunction which had been previously ordered. The defendant Garrett appealed.

*H. G. Smith*, for complainant.

*W. T. Brown*, for defendant.

REESE, J. delivered the opinion of the court.

Ingram purchased of Morgan a tract of land, and took from him a deed of conveyance, with covenants of seizin, title to convey, and general warranty, and he went into possession. At the time of the sale Morgan had no title, except a bond from one Rivers, whose wife was one of the heirs of one Rhodes, (these heirs being owners of the land,) and Morgan did not communicate to complainant, that he had no title, or a title so defective as almost to amount to no title. Rivers is dead, and more than a thousand dollars of the consideration from Morgan to the administrators is unpaid, and legal proceedings to subject the land to the payment of it have been commenced. Morgan is utterly insolvent. The last of the price or consideration to be paid by Ingram to Morgan is a note, which Morgan passed by delivery, and without endorsement, to Garrett, in payment of a precedent debt. Upon this note Morgan, for the use of Garrett,

[*Ingram vs. Morgan, Garrett, et al.*]

has obtained a judgment at law, and this bill is filed to enjoin that judgment. And the first enquiry is, whether complainant, as against Morgan, is entitled to relief in equity? and we think he is; 1st. The confidence between vendor and vendee requires where such defects of title as those of the case before us existed at the time of the sale, that they should be stated by the vendor to the vendee, and the suppression of them amounts to fraud. 2ndly. Upon the covenants of seizin and title to convey, Ingram has a present and active right of action at law against Morgan for breaches of those covenants of the deed, and he could not fail to recover to the extent of the unpaid consideration due to the administrators. This indeed would repel him from a Court of Chancery, but that Morgan is admitted to be utterly insolvent, and a judgment against him would be worthless. This differs from a covenant of warranty, where there is no present right of action, and can never be till eviction, which may never take place; and where, therefore, a Court of Chancery will grant no relief against the payment of the consideration, on the joint grounds of a defect of title, and the insolvency of the vendor. Does Garrett stand in a better situation than Morgan in the present case? We are of opinion that he does not; he received the note in payment of a pre-existing debt, and without endorsement. He has not the legal title to the note, and did not receive it in the due course of trade. There is no principle of public commercial policy to come in aid of his claim, and the circumstances under which he took the note are not identical with those set forth in the case of *Ingram vs. Vaden*, (3d Hump. 51.) so as to repel the complainant from setting up his equity as against him. The promises he made to pay, in ignorance of his condition with regard to title, will not prevent him from resisting the payment of the note. So far as Garrett has any equity, it is founded upon the satisfaction of his pre-existing debt against Morgan, and he has no legal title. Ingram's equity is prior in point of time, and must prevail in point of right. Let the decree of the Chancellor be affirmed.

## BROWNING vs. JONES.

The first day of the term is the return day of executions.

This is an action of debt brought by Mary A. Browning, an infant, by her next friend L. Browning, in the Circuit Court of Haywood county, on the 30th day of May, 1840, against Jones, sheriff of Haywood county. Plea *nil debet*, and issue. It was submitted to a jury at the October term, 1840, Read, Judge, presiding.

It appeared that at the June term, 1838, Mary A. Browning, by her next friend, L. Browning, recovered a judgment in the Circuit Court of Haywood county, for the sum of \$6046 against R. Hightower, and that on the 6th day of August, 1838, an affidavit having been made in accordance with the then existing law, a *ca. sa.* issued against Hightower. It came to the hands of Jones on the same day. Hightower was not in Haywood county from March 1838, till the first Monday in October, 1838, and on Tuesday after, to wit, the second day of the October term, to which term the writ was returnable, Jones arrested him. The writ was returned with the following endorsement thereon:

“Executed by taking Robt. Hightower and delivering him up to the Circuit Court of Haywood county, at the October term, 1838; say second day. EAS. JONES, Shff.”

It appears that Hightower was arrested on Tuesday morning, and that on the evening of that day he was walking at large, not in the custody or control of any one; and that on Wednesday, the 3rd day, he filed a schedule of debts due him, and effects, and took the oath of insolvency, and was ordered to be discharged from custody.

The Judge charged the jury, that the first day of the term was the return day, and that an arrest made on the second day of the term to which it was returnable, was an illegal and void act.

The jury returned a verdict for the defendant. The plaintiff moved the court for a new trial, which was overruled and judgment rendered. The plaintiff appealed.

[*Browning vs Jones.*]

This case was argued by *Mr. Totten*, for plaintiff; and by *W. T. Brown, Strother, Loving and McLanahan*, for the defendant.

REESE, J. delivered the opinion of the court.

This is an action brought to recover the amount of an execution of *capias ad respondendum*, for the alledged escape of the prisoner arrested thereon. The case at the last term of the court was fully argued upon the general questions, whether the facts shown in the record constituted an escape, and whether in this form of action the defendant, if an escape took place, should be held liable for the full amount of the execution, or could be permitted, by showing the insolvency of the prisoner or other facts, to reduce the recovery of the plaintiff to the actual injury or damage sustained by the plaintiff on account of the wrongful acts or omissions of the defendant.\* The court was fully satisfied on all these questions, that the law was with the plaintiff in error. And the question for the consideration of the court is, upon the validity of the arrest; it appearing that it had been made on the second day of the term to which the process was returnable, or on Tuesday.

The act of 1794, ch. 1, sec. 10, and of 1803, seeming satisfactorily to establish, that the second day of the term was the return day thereof; and this court having, in the case of *Valentine vs. Cooly*, authoratively decided that such was the proper construction of said acts; and that, therefore, the vigor and efficiency of the process continued to exist throughout the return day; that question, too, might have appeared to be free from doubt, but the act of 1833, ch. 43, was brought to the notice of the court. The act is printed in the revisal of Car. & Nic. p. 114, under the head of Attorney General, and not under that of sheriff, or process of any sort, and entirely escaped the notice of counsel and court at the time of the argument and discussion of the case of *Valentine vs. Cooly*, 1 Hump. 38. The case was, therefore, continued till the present term of the

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\* *Bonafus vs. Walker*, 2 Term Rep. 132; *Watson on Sheriff*, 143; 6 John. Rep. 270.



[*Browning vs. Jones.*]

court, in order that the effect and operation of the act of 1833, upon the former statute, regulating the return of process might be again argued and considered. This has been fully done at the present term. Statutes are repealed or changed, in whole or in part, by subsequent statutes, when the latter referring to them in terms, declares the repeal or change, and the extent of it; or, when the provisions of the subsequent statutes, in their operation and effect, are inconsistent with, or repugnant to the unchanged or unmodified operation and effect of such former statutes. In this latter case, such former statutes are repealed, or changed or modified by the necessary implication of an express intention on the part of the legislature to compass that end, to the extent, and in those particulars only, in which such inconsistencies or repugnancy exist; and this, even, without any reference to such former statutes, or any express declaration to that purpose. This, we are of opinion, is the effect of the act of 1833, ch. 43, upon the former statute, so far as relates to the second day of the term being the return day of the process. It will be remembered, that the case of *Valentine vs. Cooley*, determines as a principle, and there was nothing new in the principle, that returnable process on the day of its return, whatever day that might be, would retain through the whole of that day all its vigor and vitality. It was not *functus officio* till the end of that day. But the act of 1833, ch. 43, sec. 1, declares it to be the duty of the different Attorneys General in this State on the second day of each and every term of the County, Circuit and Supreme Courts held within his district, to call upon the Clerks of said courts for their execution dockets, and if it shall appear that an execution has been placed in the hands of any sheriff, upon which any State tax, &c. &c.; and if it shall appear that he has failed to return the same, it shall be the duty of the court to render judgment, &c. And the 3d section provides, that if the clerk shall fail to exhibit his execution docket when called on as above, he shall forfeit, &c., fifty dollars. From the general view of the first section, it would appear to have been the object of the legislature to provide this summary remedy on behalf of the State or county with reference to State tax, fines, common school funds, or other revenue;

[Saunders &amp; Martin vs. Harris.]

but it would seem far from certain, that in the concoction of the section such interpolations did not take place, as to make it the official duty of the Attorney General to embrace all claims for cost and debt of private individuals, which happened to be associated with those fiscal demands of the State or county. Be this as it may, the State tax may be an incident to every execution; every court is embraced, County, Circuit and Supreme, and every term of every court, and every Attorney General, in the ample scope of the law. The Attorney General must call on the second day for the docket; the docket must then be made out to show the sheriff's default; he is in default, if before that time he has not returned his execution; and it is the duty of the court thereon to give judgment. All these provisions are entirely repugnant to the idea, that at this identical time, while the Attorney General and the court are thus ascertaining the previous default and consequent liability of the sheriff, he has all his executions in his hands in full life and vigor. This cannot be so. The second day of the term, when all these events, according to law, may and must happen, cannot be the return day of the writ. The day before must be necessarily the return day of the process, and the last day of its vitality. It is difficult to imagine a stronger instance of the repeal or modification of a former law by necessary implication. We are of opinion, therefore, that the judgment in this case be affirmed.

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SAUNDERS & MARTIN vs. HARRIS.

A sheriff or constable is authorized to demand a bond of indemnity from plaintiff in execution before levy, in all cases of disputed title to property; and if it be not given, he may return the *fi. fa.* no property found. He is not bound to take the responsibility of judging of title in any case, where it is disputed.

Saunders & Martin, partners, instituted an action on the case against Harris, sheriff of Hardeman county, for a false return. The defendant pleaded not guilty, and the case was submitted to a jury at the May term, 1842, Dunlap, Judge, presiding.

[Saunders &amp; Martin vs. Harris.]

Martin & Saunders recovered a judgment against Gallaher, King and others in the Circuit Court of Wayne county; *fi. fa.* issued, and was placed in the hands of Harris, sheriff of Hardeman, in which county King resided. On the day after the *fi. fa.* came to the hands of the sheriff, King with the view of securing other creditors, gave them a deed of trust on his property. Harris addressed them a letter, informing them of his wish to have a bond of indemnity executed before he levied. It does not appear that any bond was executed, and Harris returned the execution "no property found."

The Judge charged the jury, that where there was a deed of trust on property of defendant in execution, the sheriff had a right to require a bond of indemnity before levy, whether that deed of trust was executed before the *fi. fa.* came to his hands or afterwards, unless he had an opportunity to levy the *fi. fa.* before the deed was made.

The jury returned a verdict for the defendant. The plaintiffs moved the court for a new trial, which was overruled, and judgment rendered. The plaintiffs appealed.

*Barry*, for the plaintiffs. This is an action on the case, brought against the sheriff for a false return of *nulla bona*, on an execution in favor of the plaintiffs. Plea; not guilty.

1. If a sheriff have an opportunity of taking the defendant or his goods, on a writ directed to him for that purpose, and neglect to do so, he is liable to an action. *Watson on Shff.* 82, 203: 7 C. D. 286, 545.
2. An inquisition taken by a sheriff, to try the right of property, is not admissible in evidence, even in mitigation of damages. 3 Maule & Selwyn, 175, *Glossop vs. Pole*: *Watson*, 203: 7 C. D. 552.
3. In an action of this kind, the possession of goods by the defendant in execution, is *prima facie* evidence of property, to charge the sheriff, on a return of *nulla bona*. 2 Term Rep. 609, *Crossley vs. Arkwright*: 7 C. D. 287: 5 Wend. Rep. 309, *Wayne vs. Seymour*.
4. The sheriff cannot require a bond of indemnity, before he proceeds to levy, unless the title of the property is disputed.

[Saunders &amp; Martin vs. Harris]

Nic. & Car. 184, act of 1825, ch. 40, sec. 2: 8 Cowen Rep. 65, *Curtis vs. Patterson*.

1. The "dispute" must be of such a character as *prima facie* to involve some substantial claim of right.
2. Here the sheriff *knew* the claim set up to be merely colorable; as the lien of the execution overreached the deed of trust. This he, as sheriff, was bound to know.
5. The sheriff cannot insist upon the plaintiff showing him goods on which to levy, unless there is *reasonable* ground for believing that he may mistake and expose himself to an action. 7 Mass. Rep. 123, *Bond vs. Ward*.
6. A party is not bound to show property unless required by the sheriff. 4 Mass. R. 60, *Marshall vs. Hosmer*: 4 Bingham. N. C. 197, *Dyke vs. Duke*: 5 Dow. & Ry. 95, *Dean & Chapt. of Hereford vs. McNamara*.
7. In an action for false return the sheriff is liable in damages to the whole amount of the execution. 5 Day R. 221. *Arkley vs. Chester*.

*Miller and Fentress*, for the defendant.

TURLEY, J. delivered the opinion of the court.

It appears in this case, that the defendant, the sheriff of Har-deman, refused to levy and sell property under an execution in favor of plaintiff, without indemnity, when the property had been conveyed in trust after the execution came to his hands, but before service. By law the sheriff is entitled to ask indemnity before sale in all cases when there is a dispute as to title, and why? In order that he may not be compelled to take the responsibility of judging of title, which was fixed upon him by the common law, and which would, with us, be ruinous upon the officers. If not bound to judge in one case of title, surely not in another; if not in a difficult one, not in a plain one. For this would fix the responsibility upon a most uncertain basis, one perfectly intangible and illusory. Affirm the judgment.

PLANTERS' BANK *vs.* HENDERSON *et als.*

Pleasant Henderson had an undivided equitable interest in certain slaves, which were in the hands of a trustee, to whom they had been conveyed for the benefit of the mother of P. Henderson during her life. During her life P. Henderson, with the intent to delay his creditors, conveyed his interest without consideration to J. M. Henderson. Held, that this conveyance was not void as against the judgment creditors of Pleasant Henderson, because the estate at the time of the conveyance was not subject to *fi. fa.* against P. Henderson, but it communicated the naked legal title on the death of the mother to J. M. Henderson, with a resulting trust for the grantor, P. Henderson, and subject to the claims of his creditors in equity.

This bill was filed in the Chancery Court at Huntingdon, in March, 1842, by the Planters' Bank, a judgment creditor of Pleasant Henderson, against Pleasant Henderson, Norman, sheriff of Carroll county, and against Bullard and others, judgment creditors of J. M. Henderson.

The bill alleges, that the Bank, at the May term, 1841, recovered a judgment against Pleasant Henderson for \$2654; that a *fi. fa.* issued and was returned no property found; that Pleasant Henderson had an undivided interest in certain slaves, in which his mother held a life-estate, which was in the hands of a trustee for her benefit at the time of the rendition of the judgment and return of the *fi. fa.*; that in August, 1840, (the mother of P. Henderson being then dead,) a decree was passed in Chancery, dividing the slaves, and that Alfred, Mary, Solomon, Candis, Jordan, Susan and Henry were allotted to P. Henderson; that previous to this decree, (in February, 1840,) P. Henderson made a conveyance of all his interest in his father's estate, including the slaves, to J. M. Henderson; that this conveyance was without consideration, and intended to defraud creditors; that since the decree aforesaid, Bullard and other judgment creditors of James M. Henderson have caused their executions to be levied on said slaves as the property of James M.; and Norman, the sheriff who levied the same, avows his intention to sell the slaves for the satisfaction of the aforesaid executions against James M.

The bill prays the subjection of the slaves to the satisfaction of complainant's judgment.

The bill was taken *pro confesso* against all the defendants except Bullard. He answered. He declared that he had recov-

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ed a judgment against J. M.; that the property had been conveyed to James M. by Pleasant; that he had no knowledge of any fraud, and asserted his right to have his judgment satisfied by the sale of the slaves. To this there was a replication filed. There was no proof taken.

At the February term, 1843, it was agreed between the parties that judgment was obtained and *fi. fa.* levied by Norman, as stated in the bill; that the conveyance from P. Henderson to J. M. Henderson was without consideration, and made to prevent said property from being levied on and sold to pay the debts of Pleasant H., and for no other purpose; that the defendants had no knowledge of the motive which induced the conveyance from P. to J. M.; that the title to the negroes were vested in a trustee, and were allotted to P. H. as charged in the bill, and that the conveyance was made in February, 1840.

On this state of facts Chancellor McCambell, at the February term, 1843, ordered and decreed, that the slaves be sold for the satisfaction of complainants judgment. The defendants appealed.

*Fitzgerald*, for the complainant.

*Pavatt*, for the defendants.

GREEN, J. delivered the opinion of the court.

This is a bill filed to subject the interest of the defendant Henderson in certain negroes, to the satisfaction of a judgment obtained by the complainant against him. The facts are as follows:

The complainant obtained judgment against the defendant, Pleasant Henderson, and others, in the Fayette Circuit Court, at the May term, 1841, for \$2654 and costs, and issued an execution, directed to the sheriff of Fayette county, which was returned no property found. The defendant, P. Henderson, had an interest in a number of slaves, which had been given to his mother for life, and who was then dead, but the slaves were still in the hands of the trustee and undivided. In Fe-

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bruary, 1840, before said judgment was rendered, the said P. Henderson conveyed to his brother James M. Henderson all his interest in the slaves aforesaid. This deed was proved and registered in Carroll county, where the property then was; but it was merely colorable, having been executed without consideration. At the August term, 1841, of the Chancery Court, at Huntingdon, a decree was made for the division of the negroes aforesaid, and in the latter part of that year the portion of P. Henderson was allotted to him. The other defendants, who are judgment creditors of James M. Henderson, caused the said negroes to be seized for the satisfaction of their debts; insisting that the negroes are liable as the property of the said J. M. Henderson. The complainant has caused its execution to be levied on the same negroes as the property of Pleasant Henderson; but the sheriff persists in his purpose, to sell the property by virtue of the executions against James M. Henderson; to prevent which, and subject the property to the satisfaction of its judgment, the complainant exhibits its bill.

The bill is framed, and the cause has been argued, as if the conveyance from Pleasant to James M. Henderson was to be regarded and treated as a fraudulent conveyance as to creditors under the statute. But we cannot so consider it. At the time the conveyance was made, Pleasant Henderson had an equitable interest in an undivided property, which was still in the hands of the trustee, to whom it was conveyed for the use of his mother, during her life. This property was not subject to execution. And if the deed to James M. Henderson, had not been made, it could not have been levied on by the complainant's execution. If then the deed to James M. Henderson was declared void for fraud, still the property not being liable to execution, the complainant would not be benefited thereby. It is, therefore, absurd to say that a deed is fraudulent against creditors who are not injured by its execution, and who would not be benefited if it were declared void. Story's Eq. sec. 366, 367.

The next enquiry is, what property James M. Henderson acquired in these negroes by this deed, and what rights

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have the defendants by the levy of their executions on the negroes.

It is admitted that James M. Henderson gave nothing for the negroes, and that the conveyance to him was merely colorable. He acquired, therefore, no equitable interest to the property; for an equity cannot exist when there is no consideration. Although the deed to him, of February 1840, may have vested in him the *legal title* to the negroes, by relation, when, in 1840, they were divided by a decree of court, yet it could only be a *mere* naked legal title, with a resulting trust for the grantor, Pleasant Henderson. Thus situated, the defendants, creditors of James M. Henderson, levied their executions. It is clear they could get by this levy, no better right to the property than their debtor possessed; a naked legal title. But we have seen that Pleasant Henderson was entitled to the negroes in equity, notwithstanding the conveyance; and the complainant has a right to subject this equitable interest to the satisfaction of its judgment. Against this equity, the defendants have no opposing equity, and, therefore, their legal advantage is wholly unsupported by a consideration, which in a court of equity would enable them to resist the complainant's claim. It would have been otherwise, had the property been sold by virtue of the executions of the defendants. In that case, the purchasers having advanced their money, which would have created in them an equity, and which coupled with the legal title, would have protected them. Their equity would have been equal to that of the complainant, and having the legal advantage, they would have had the better title. But as the defendants have no equity, the complainant is entitled to a decree for the sale of the negroes for the satisfaction of its execution; and if there should be an overplus, it will be paid to Pleasant Henderson.



**FELTZ vs. CLARK.**

1. The office of administrator is not filled till the bond be given.
2. And when the county court appointed Clark, who was the nominee of the nearest of kin, to be administrator of William and Priscilla Feltz, and Clark gave bond for the administration of Priscilla's estate only, but proceeded to settle the estates of each; and after the lapse of five years the nephew of the deceased his nearest of kin resident in the state, applied for letters. Held, that it was proper, upon bond being given by Clark according to law, to dismiss the petition of the applicant.

At the September term, 1842, of the County Court of Dyer county, Pleasant Feltz presented his petition, verified by affidavit, praying to be appointed administrator of the estate of his deceased uncle William Feltz. The prayer of this petition was refused and the petition dismissed. The petitioner appealed to the Circuit Court. At the October term, 1842, Harris, Judge, presiding, the judgment of the County Court was affirmed. The petitioner appealed in error to the Supreme Court. The bill of exceptions shows that William Feltz and his wife Priscilla died intestate and without issue, in the county of Dyer, leaving considerable personal estate; that the only surviving brother, Henry Feltz, a citizen of Virginia, by power of attorney, dated 7th September, 1837, authorized and empowered William Sampson, of Dyer county, to institute all proper means to recover his distributive share of the estate of his deceased brother; that in promotion of this object, Sampson procured the County Court in 1838 to appoint Henderson Clark administrator; that the following order was recorded: "Ordered by the court, that Henderson Clark be appointed administrator of the estate of William Feltz and Priscilla Feltz, deceased, and enter into bond for \$2000, payable on condition as the law directs, and took the necessary oath as administrator"; that Clark thereupon gave bond in the penalty of \$2000 for the due and legal administration of the effects of Priscilla Feltz, deceased; that no bond was given for the administration of the estate of William Feltz, deceased; that the records of the County Court of Dyer showed, that in the actual administration of said estate, the estate of William and Priscilla was included, and that Clark had discharged the debts and paid three of the distributees their respective shares. The bill of exceptions

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shows also that the petitioner was a nephew of the deceased William Feltz and his next of kin resident in the State.

*A. W. O. Totten*, for petitioner. It does not appear in the order appointing Clark administrator, that the court had jurisdiction or power to make the order.

1. The record should assume all the facts necessary to give it validity, viz; that the decedent died intestate, being a resident of Dyer county; or if a nonresident, having effects there; and that Clark was of kin or a creditor. Unless these facts do exist, the appointment is void for want of jurisdiction.

It is a proceeding *in rem* in a court of record, and the action of the court can only appear by its record; and if that record do not assume the facts above recited, the power of the court does not appear. *Nelson's lessee vs. Griffin*, 1 Yer. R. 628; 3 East, 129.

Clark administered on Wm. Phelps's estate; the intestate is Wm. Feltz; whether one is administrator, is to be tried by the record.

2. But if the proof of these facts may be *in pais*, and not by the record, yet the court did not exercise its power to grant the administration, and no appointment was in fact made, because no bond was taken:

By the act of 1794, ch. 1, s. 47, (which merely re-enacts that of 1777, ch. 2, s. 62, in this respect,) it is provided, "That the county courts shall and may, within their respective counties, take the probate of wills," &c. "and the said courts shall and may make orders for issuing letters testamentary and letters of administration, which letters shall be signed and issued by the clerk of said court." N. & C. 708. The letters of administration should be only copies of the order, neither more nor less. 1 Yer. 628. The act of 1715, ch. 48, s. 5, provides, that the clerk shall not issue "LETTERS of administration, without the administrator has taken the oath, &c. and also has given sufficient bond, with two or more able sureties, taken before the county court, respect being had to the value of the estate," &c. And the 4th section of the same act provides, that no one shall enter

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upon the administration of any deceased person's estate, without letters of administration, &c. under a penalty.

It would seem, then, that as no bond was taken and approved of by the court, its action was imperfect and incomplete, and it did not exercise its power.

This principle seems to be acknowledged in the case of *Martin v. Peck*, 2 Yer. R. 298, where it was held that the assent of an executor to a separate legacy, he not having proved the will and entered into bond with sureties, will not vest the legal title in the legatee, because not in fact the executor, the same law in this respect being applicable to executors and administrators.

So in *Drane v. Bailless*, 1 Hum. 175, it was held, that although an executor of an executor is the executor of the will of the first testator, yet if he do not enter into bond, with sureties, to administer the estate of the first testator also, under his will, he is not his executor, but will be deemed to have renounced that office. See also *Baldwin v. Buford*, 4 Yer. 20.

3. If the plaintiff is next of kin, and therefore entitled to the administration, to effect this object the former grant should be revoked, deeming it in this respect voidable only, and not void. The court should at least have made this order. 1 Wms. Ex. 361.

*Sampson*, for the defendant.

REESE, J. delivered the opinion of the court.

In 1837, or before that time, William Feltz and Priscilla his wife departed this life in the county of Dyer, intestate and without issue. His only surviving brother, Henry Feltz, of Virginia, duly empowered Isaac Sampson, Esq. of Dyer county, to institute all proper means to recover his distributive share of the estate of William Feltz. To this end, said Sampson procured the said County Court of Dyer, at their January term, 1838, to make the following order, to wit: "Ordered by the court, that Henderson Clark be appointed administrator of the estate of William Feltz, deceased, and Priscilla Feltz, his wife, deceased; and enter into bond for two thousand dollars,

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payable on condition as the law directs, and take the necessary oath as administrator." The bond, however, on that occasion made, although in the penalty of two thousand dollars, did not specify in its conditions that Henderson Clark had been appointed administrator of the estate of William Feltz, but named Priscilla Feltz only; nor was bond at any time given by Clark for administration of the estate of William Feltz. But the records of the County Court of Dyer show that in the actual administration by said Clark, the estates of both William and Priscilla Feltz were included; and defendant Clark had paid off the debts of William Feltz, deceased, and also had paid off three of the distributees. In this state of things, and five years nearly after the informal grant of administration on the estate of William Feltz, Pleasant H. Feltz, his nephew, and next of kin resident within the State, presented his petition to the County Court of Dyer to be appointed administrator of the estate of the said William Feltz. The application was refused by the County Court, and their judgment in that behalf was affirmed, on appeal, in the Circuit Court; to reverse which judgment, the appeal in error has been prosecuted to this court. If bond had been given pursuant to the statute by Henderson Clark as administrator of William Feltz, it would scarcely be contended for the plaintiff, after such a lapse of time, and after so much done towards the final administration of the estate, that it would have been the legal duty of the County Court, upon the mere ground of petitioner's proximity in blood to the intestate, and without any wrong or default of the defendant, to have removed the latter from the administration, and given the same to the petitioner. But it is urged by the plaintiff, that no bond having been given, Clark, the defendant, cannot be regarded as in any sense administrator of the estate; and there being no administrator, that the petitioner, as a matter of course, should have been admitted by the County Court into the administration. If this were so, in sheer strictness, it would be upon the ground merely of the want of a bond; but that want being supplied, Clark would present himself as one who, five years before, had been appointed administrator; who at the time of his appointment was the nominee, in substance, of the

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nearest of kin to the intestate, and by one degree nearer than the petitioner; who had marshalled the assets and paid the debts of the estate; and out of the surplus had paid the portion of several of the distributees. And so presenting himself, the County Court would have acted improperly, thrown the estate into confusion, and produced useless litigation, by removing the defendant and appointing the petitioner to the administration. But although in the absence of a bond the court may have regarded the defendant as administrator *de facto*, surrounded by all the other circumstances indicated, still, until bond actually given, we do not perceive how, under our statute, the court could regard the office of administrator as in strictness filled. We cannot say, therefore, that in the judgment of the Circuit or County Court there has been no error, and we must reverse the judgment and remand the cause to the County Court of Dyer county; and said County Court will grant letters of administration on said estate to the petitioner according to law, unless said Henderson Clark shall enter into bond with sureties to the satisfaction of the County Court, for the faithful administration of said estate; which being done, the plaintiff shall take nothing by his motion, and his petition shall be dismissed.

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ANTHONY vs. THE STATE.

1. An indictment or presentment for gaming must lay some day as the day on which the offence charged was committed, and the day so stated must be within the time within which the law authorized a prosecution to be commenced.
2. A charge in an indictment for gaming, that the defendant bet "valuable things," is too vague. It must set forth and describe the valuable thing bet.

At the October term, 1840, of the Circuit Court of Dyer county, the grand jury presented N. W. Anthony for the offence of gaming. The presentment charged, that Anthony, on "the first day of September, in the year one thousand and forty, with force and arms, in the county of Dyer, did then and there play, wager, hazard and bet, at a game of cards played with cards, and did then and there bet, wager and hazard money, bank

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notes, change tickets, and other valuable things, upon the result of said game of cards" &c.

The defendant moved to quash the presentment. The motion was overruled. The defendant thereupon pleaded in abatement, that the presentment was not signed by the grand jury. The attorney for the State took issue on this plea and the case was submitted to a jury at the October term, 1841: Harris, Judge, presiding.

It appeared by the testimony of a grand juror, that four of the grand jury could not write their names, and that the witness, in their presence and at their request, signed their names to the presentment. The court charged the jury, that if the signing was done in the presence and at the request of those who could not write, it was a good signing. The jury returned a verdict that "the grand jury did sign the presentment," and the defendant was ordered to answer over. He pleaded not guilty. In an issue on this plea, it appeared in evidence that the defendant played at a game of cards in Dyer county, and bet thereupon "cash notes," within the six months next preceding the finding of the presentment, and that the "cash notes" were valuable.

The court charged the jury, that if the defendant played and bet on a game of cards for valuable cash notes, within the county of Dyer, and within six months next preceding the finding of the presentment, he was guilty.

The jury found him guilty; and a motion for a new trial having been made and overruled, he moved in arrest of judgment. This motion was also overruled, judgment was rendered, and the defendant was fined.

*R. P. Raines*, for the plaintiff in error. The court should have granted a new trial. There was no legal evidence to sustain the presentment. Cash notes were not bank notes, change tickets, nor were they money, and nothing could be given in evidence under the words "valuable things."

2. The judgment should have been arrested, because the face of the presentment shows that the gaming charged was not within six months of the time of finding.

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*Attorney General*, for the State.

GREEN, J. delivered the opinion of the court.

This is a presentment for gaming. The presentment was made at the October term of the Dyer Circuit Court, 1840; and charges the gaming to have taken place on the 1st day of September, one thousand and forty. The act of 1824, ch. 5, sec. 4, limits prosecutions for gaming to the period of six months after the offence may have been committed. This presentment alleges the offence here charged, to have been committed more than six months before the prosecution commenced. It follows, that it was not authorized by law, and the defendant should not have been held to answer it. The date of the gaming was doubtless inserted by mistake; but that cannot change the question. The indictment must lay *some* day, and the day so stated must be a period within which the law authorizes a prosecution to be commenced.

2d. In addition to the above, there is another ground of error in this record. The presentment alleges, that the parties bet "money, bank notes, change tickets; and other valuable things." The evidence is, they bet "cash notes." This evidence is plainly inadmissible to support the allegation as to the wager of "money, bank notes, or change tickets," for the "cash notes" constitute neither of these. Nor would it be admitted, to support the charge, that "other valuable things" were bet. This charge is too vague; for although these words are used in the statute, so as to make it criminal to gamble for any "valuable thing," the "valuable thing" so bet must be set forth and described in the indictment or presentment.

On both grounds there is error; but as upon this presentment the party ought not to have been held to answer, the judgment must be arrested.

**FARMERS' AND MERCHANTS' BANK vs. BATTLE AND MASSEY.**

1. The general rule of law in reference to giving notice through the postoffice to an endorser, is this: The notice shall be directed to the postoffice nearest the residence of the endorser; yet if it be directed to the post office through which the endorser usually receives communications and transacts his business, it shall be good, though not the nearest to his residence.
2. It is not necessary in all cases where the endorser resides in the county in which the note is payable and protested, that a special messenger should be sent with notice. It is only necessary, that notice should be sent by a special messenger where the parties reside at the *same place*, which includes all those who reside in the same neighborhood and transact their business through the same postoffice.
3. Where an endorser wrote under his name the name of his post office in compliance with a custom of the bank, established for the purpose of learning the office through which the endorser transacted his business, it was held that this was an implied direction that notice should be sent to such post office, and notice given accordingly fixed the liability of the endorser.

The Farmers' and Merchants' Bank instituted this action of assumpsit in the Circuit Court of Shelby county, against Battle & Massey, on the 12th of May, 1842. The plaintiff declared against the defendants as endorsers of a promissory note, payable to plaintiff, at the Union Bank of Memphis, for \$200. The defendants pleaded non-assumpsit, and an issue on this plea was submitted to a jury of Shelby county, W. C. Dunlap, Judge, presiding.

It appeared, that Massey executed a note payable to Battle, at the Union Bank of Memphis, for \$200, four months after date; that it was the custom of the Union Bank in all cases to require of endorsers of notes executed at that branch to write under their names the post office at which they wished notice sent to them; that the defendants Battle & Massey endorsed this note and wrote under their names "Shelby Corner;" that this was the name of a post office in Shelby county, distant about 25 or 30 miles from Memphis; that the mail went from Memphis to Shelby Corner twice a week; that Shelby Corner was the post-office nearest the defendants' residences and within three or four miles of their respective residences.

It also appeared, that the note was protested for nonpayment and written notice deposited in the post office at Memphis in due time, directed to the defendants at "Shelby Corner, Tennessee."

The defendants proved, that at the time they endorsed the



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note, and from that time till the protest thereof, they resided in the same county (Shelby) in which the note was made payable and was protested; that Memphis and the Farmers' and Merchants' Bank, the holder of the note, were in Shelby county.

The Judge charged the jury, that if the endorsers resided in the same county where the note was payable and protested for nonpayment, the law required the holder to send a special messenger with the notice, and that notice sent by mail, directed to them at their nearest post office, would not be sufficient, although they were required to endorse their post office address under their names on the note, and had done so.

The jury returned a verdict for the defendants, and the plaintiff appealed.

*H. G. Smith*, for the bank. The Circuit Court is deemed to have erred:

1st. In declaring the rule to be absolute, that where the holder and endorser reside in the same county, a special messenger must be employed and that the mail will not answer in any case:

2d. In denying any efficiency to the fact of the endorsers' underwriting to their names their post office address.

The general principle is, that when the parties reside in the *same place*, notice must be by special messenger or by equivalent means: but no case seems to have gone to the extent of defining that the *same county* is absolutely the *same place*. The case in *Martin & Yergers's Rep.* 183, is not such. Nor to that extent does the case in 1 *Yerg.* 166, appear to go. In *Mart. & Yerg.* the same place is defined to be the compass of the same postoffice; page 189. And a distinction is taken between the depositing the notice in the office for the endorser to obtain from the same office, and the resorting to the post office for transmission to another the office of the endorser.

The case in 1 *Yerg.* approaches very nearly to defining the same county to be absolutely the same place. The Circuit Judge in that case stated the identical proposition. But the court, while affirming his judgment; avoid employing his language or adopting the unmitigated extent of his proposition.

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That the Supreme Court did not intend to adopt the absolute rule declared by the Circuit Judge, is obvious from their not having so said in precise words. The easy and natural course of the court would have been, if it was intended to adopt such rule, to state it in direct terms, and place the decision upon it. This was not done, and therefore it must be inferred was not intended.

The decision is placed on the ground that the holder did not employ the best means reasonably in his power to inform the endorser of the dishonor of the note; such means it being his duty to employ.

Obvious differences appear between that and the present case. In the former, the notice was directed to an office which the endorser did not use; in the latter, the notice was sent to the office prescribed by the endorser himself. In the former, the distance between the holder and endorser was eleven miles; in the latter, from twenty-five to thirty miles. In the former, a notice deposited in the office at the holder's residence was more likely to give early intelligence to the endorser than as addressed; in the latter, the reverse is true, the notice being sent to the regular post office and addressed to the endorser. In the former, the best means reasonably in the power of the holder, were not employed; in the latter, those means were resorted to.

In both cases the question was, whether due notice was given, which is a question of law. In the former, it might well be held on the facts, that such notice was not given. In the present case, it would be strange to decide that the holder should send a special messenger twenty-five or thirty miles to the endorser, when the endorser informed him in reference to the very matter in hand, his post office address, and the mail ran twice a week to that office.

The cases on which the doctrine declared by the Circuit Judge mainly proceeds, are between *Ireland v. Kip*, 10 Johns. R. and 11 Johns. R. In them, the rule is stated, that when the parties reside in the same place or city, the notice must be personal or by equivalent means. The holder and endorser resided in the same city, used the same post office, and no mail

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or penny post ran between their place of abode for the transmission of their letters. In which respects they differ widely from the present case.

The New-York cases do not establish the absolute rule, that in respect to the mode of giving notice of the dishonor of negotiable paper, certain ascertained municipal boundaries are the compass of the same place, appears from the late case reported in 2 Hill's N. Y. Rep. 587, cited in 55 Am. Ju. 172, which is in terms following:

"Though the holder and endorser reside in the same town, but several miles distant from each other, notice by mail suffices, if it appear that there is a postoffice near the endorser's residence, at which he usually receives letters, &c. and a regular communication by mail between the two places."

Of similar purport is the late case reported in 5 Shepley's Maine Rep. 360, cited in 52 Am. Ju. where the cashier of a bank at Bangor, holding a note for collection, transmitted it to the cashier of a bank at New York for demand, who enclosed notices of its dishonor for the endorsers at Bangor, under cover to the cashier at that place, who received them and immediately put them back into the postoffice at Bangor, addressed to the endorsers. This was held good notice to the endorsers.

2. The Circuit Judge debarred the jury from allowing any efficacy to the fact, that the endorsers wrote beneath their names the postoffice address.

The underwriting their office was a fact in evidence. It had some meaning. What it was, was the province of one or the other, the court or the jury, to decide. In either case, it was by the court held for naught. If its meaning was to be expounded by the court, the court gave it none. If it was entitled to any efficacy in guiding the jury on the complex question of notice, the court withdrew it from the jury.

No other conceivable use for the postoffice address exists, but to direct the holder where and how to transmit notice of the dishonor of the paper. It not only indicates the place at which the endorser will receive the notice, but likewise the use of the customary means of transmitting such information to the place. It implies the use of the mail as well as the office.

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*Stanton and J. C. Humphreys, for the endorsers.*

GREEN, J. delivered the opinion of the court.

This is an action by the holder against the defendants as endorsers of a promissory note payable at the branch of the Union Bank at Memphis.

The plaintiff proved, that notices of demand and nonpayment were placed in the post office at Memphis in due time, addressed to the defendants at "Shelby Corner post office;" that said post-office is twenty-five or thirty miles from Memphis, where said note was payable, and is within three miles of the residence of the defendants, and is their nearest postoffice. It was proved, that Shelby Corner post office is in the same county with Memphis, where said note was payable. The defendants, as it was the custom of the bank to require, wrote under the endorsement of their names, on said note, their post office, "Shelby Corner." The court charged the jury, in substance, that when endorsers reside in the same county where the note is payable and has been protested, it is necessary to send notices by a special messenger; and that notices sent to them by mail, directed to them at their nearest post office, would not be sufficient, although they might have endorsed their post office address under their names. The Circuit Court was governed in this charge, by the decision of this court in the case of the *Nashville Bank v. Bennett*, (1 Yerg. R. 166,) where the court decided, that a notice deposited in the postoffice at Murfreesborough, addressed to Bennett at Jefferson, was not sufficient; Jefferson being eleven miles from Murfreesborough, and Bennett living eleven miles from Murfreesborough and within two and a half miles of Jefferson. Although the Circuit Judge in that case told the jury, that if the defendant lived in the county where the note was payable, he ought to have personal service of notice, and that its transmission by mail to his nearest post office would not be sufficient: yet this court, in affirming the judgment, did not assume that broad proposition. The decision was based upon the proposition assumed by the court, that the holder must use "the means most likely to give the earliest actual notice to the endorser;" and as

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it appeared in proof, that Bennett was not in the habit of doing business at Jefferson, although it was so near his residence, the court *assumed* that the holder ought to have known that fact, and to have resorted to means more likely to ensure the endorser's actual reception of early notice. It would be difficult to maintain the principle of that case. The question, whether a party is in the habit of doing business at a particular post office, becomes important only where the holder seeks to fix an endorser with notice, when it had been sent to a post office which was not the nearest to his residence. In such case, proof that the party to be notified was in the habit of receiving and transmitting communications through the post office to which the notice was addressed, will be sufficient to fix his liability, though there might be another post office nearer, to which he was not in the habit of resorting. But this would by no means prove that a notice addressed to his nearest post office would not also be sufficient: for as a general rule, the law requires that it should be so addressed; but if the holder knows that the party does his business at a different post office, a notice sent to such place will be good, and will form an exception to the general rule. The court in that case refer to the case of *Barker v. Hall*, (Mart. & Yerg. R. 183,) and recognize the principle upon which it was decided. In that case the note was payable in Nashville, and the notice was deposited in the post office at Nashville, that being the nearest post office to the defendant's residence, which was seven miles from town. The court decided, that where the parties lived in the same place, a deposit of notice in the postoffice would not be sufficient, but that actual notice must be given by a special messenger. It is also said in that case, that what is meant by the same place, is where the parties live in the same neighborhood and transact business at the same post office. In such case a mere deposit in the post office will not be sufficient. We think this case states the principle correctly; but we do not think it warrants the decision of the Circuit Judge in the present case. There is no reason that a county line should be regarded on this subject. Were we so to hold, the absurdity would often exist, of the necessity to send a notice to one endorser by a special messenger a distance of forty or

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fifty miles, because his residence was in the county, whereas notice to another, residing only ten miles, would be sufficient if sent by mail, provided the party lived in another county. In the case of *Ireland v. Kip*, (10 Jh. R. 490 and 11 Jh. R. 231,) the court held, that where the party resided at Kip's Bay, three and a half miles from the postoffice in the city of New-York, a notice put in the post office directed to him was not sufficient. This case embraces the same principle decided by this court, in the case of *Barker v. Hall*. The same court, in a late case, (*Ramson v. Mark*, 2 Hill's R. 587,) decided that service of notice of dishonor cannot be made through the post office, if the party sought to be charged reside in the same place where the presentment or demand is made. But the court say in the same case, that it is otherwise if he reside in another place several miles distant, though in the same town, provided it appear that there is a post office near his residence, at which he usually receives his letters and papers, and a regular communication by mail between the two places. This case also, supports the principles of the case of *Barker v. Hall*, as well in the proposition, that when the parties reside in the same place, notice placed in the post office, addressed to the endorser, will not fix him with notice, as in the proposition, that by the same place is to be understood, when the parties live in the same neighborhood, and transact their business at the same postoffice. If a party to a bill or note live several miles distant from the place where it is payable, though it be in the same county, if there be a post office near his residence at which he usually receives his letters and papers, and to which there is a regular communication by mail from the place where the bill or note is payable, a notice sent by the mail will be sufficient.

2d. Independently of the foregoing view of the case, we think the endorsers, by writing the name of their post office under their signatures on the note, thereby impliedly directed notice to be sent, by mail, to such post office.

Upon both grounds, therefore, we think there is error in the judgment, and that it must be reversed.

## APPLEWHITE vs. A. T. &amp; E. SHAW.

1. The last endorser of a bill of exchange took a mortgage on the estate of the drawer for his indemnity, and subsequently discharged the bill and prosecuted his suit against the first endorser to judgment. Held: on bill filed by first endorser against the last, to compel the application of the indemnity to the discharge of the judgment, that no such equity existed against the second endorser by reason of such indemnity.
2. If the second endorser had received payment in whole or part from the drawer, to that extent he would not be entitled to a recovery against the first endorser. This, however, is a defence which should have been made at law; and not having been made, a court of equity would give no relief.

A. T. Shaw drew a bill of exchange in favor of Applewhite, on Kirkman, Hanna & Co. Applewhite endorsed the bill for the accommodation of the drawer, and then E. Shaw, the broker of the drawer, endorsed it, taking a deed of trust on the estate of his brother for his indemnity. E. Shaw took up the bill, and prosecuted his suit in the Circuit Court of Tipton county against Applewhite, and recovered judgment against him for the sum of \$546.

Applewhite filed this bill against A. T. & E. Shaw in the Chancery Court at Brownsville, in October, 1842. The bill sets out the above facts; and charges also, that A. T. Shaw is insolvent; that the property was sufficient to discharge the judgment; and that he had proved in the Circuit Court that said E. Shaw had said he was "almost indemnified out of said property." The bill further declares, that said E. Shaw had the control of said trust property, and prays that he may be decreed an equitable trustee for the complainant, and that he account for the property, and that it be applied to the discharge of the judgment. To this bill there was a demurrer. Chancellor McCambell, at the November term, 1842, sustained the demurrer, and ordered the bill to be dismissed. The complainant appealed.

*McLanahan* and *Harris*, for the complainant.

*Searcy*, for the defendants.

GREEN, J. delivered the opinion of the court.

The bill alleges, that the defendant A. T. Shaw was the

[*Applewhite vs. Shaw.*]

drawer of a bill of exchange for four hundred dollars; that complainant was the first endorser thereon, and defendant E. Shaw the second endorser, and that both endorsements were made for the accommodation of the drawer; that the drawer of said bill, A. T. Shaw, having become insolvent, executed a deed of trust to the said Ephraim, to indemnify and save him harmless against said liability; that the said Ephraim brought suit against complainant as first endorser on said bill, he, the said Ephraim, having paid and taken up the same, and recovered judgment thereon for the sum of \$546 50 damages; that the property conveyed to said Ephraim was sufficient to have discharged said liability, had it been applied in that way; and that complainant proved upon the trial at law, that said Ephraim had acknowledged "that he had already been indemnified out of the property conveyed in said deed of trust, almost to the amount of the debt, but not quite." Complainant does not know how the property in said deed has been appropriated, and the partial satisfaction could not be allowed under the pleas which he filed in the cause at law, so that he lost the benefit thereof; and a judgment was rendered against him for the whole amount.

The bill prays, that the execution of said judgment be enjoined, and that said Ephraim be compelled to apply the property conveyed in said deed to the extinguishment of said judgment. To this bill there is a demurrer. We are of opinion; that the first endorser of a bill or note has no equity against the last endorser, who may take up such bill or note by reason of any security he may have obtained from the maker or drawer. He has a right to secure himself by taking a deed of trust or mortgage, and still to pursue his legal remedy against a prior endorser. But if he had actually received payment in whole or in part from the drawer, he would have no right to recover to that extent from the complainant. But if this were so, the complainant might have had an ample defence at law. If he did not make it, either from negligence in failing to get proof, or for want of proper pleas to the action, it is his misfortune. He cannot have a new trial here. Affirm the decree, and sustain the demurrer.



## KIMBRO vs. LAMB.

1. Lamb endorsed a note in blank and delivered it to Kimbro, telling him, at the time of the endorsement and delivery, to fill up the endorsement as he thought proper. Held, that this only authorized him to fill it up so as to assign the legal interest to such person as he chose. It did not authorize him to endorse on the note a special assignment, waiving demand and notice to the endorser.
2. The Judge charged the jury, that if the defendant endorsed a note in blank and delivered it to plaintiff, directing him to fill up the endorsement as he pleased, it did not authorize the plaintiff to endorse on the note a waiver of demand and notice to defendant. Held, that this was not charging upon the facts. See 2 Humphreys, 283, 311, 181.

Kimbrow instituted an action of debt against Webb, the maker of a note, and Lamb, the endorser thereof. A *nolle prosequi* was subsequently entered as to Webb, in the Circuit Court of Henry county. The plaintiff averred and made proof of an assignment of the note, with a waiver of demand and notice. The defendant pleaded, that he made no such assignment, and *nil debet*, and verified these pleas by affidavit. The case was submitted to a jury, and a verdict was rendered for plaintiff. Defendant appealed, and the case was reversed. See 3 Humphreys, p. 17.

The case was again submitted to a jury, at the January term, 1843. It appeared, that Webb made a bill single, payable to Lamb, for \$333; that Lamb, for value received, endorsed on the back of said bill single his name, "J. Lamb," and delivered it to Kimbro, stating to Kimbro that he might fill up the endorsement as he thought proper; that Kimbro, at a subsequent period, wrote the following words over the signature of J. Lamb: "I assign this note to A. Kimbro, for value received, waiving the necessity of demand and notice."

Harris, the presiding Judge, charged the jury, that no demand having been made of Webb, and notice given to the endorser, there could be no recovery on the endorsement, unless this duty the law imposed on the holder had been waived by the defendant; that the fact, that the defendant had placed his name on the back of the note, of itself conferred no right upon the plaintiff to fill up the blank endorsement waiving demand and notice; that a blank endorsement authorized the plaintiff to

[Kimbro vs. Lamb.]

assign the legal interest, either to himself or any other person he chose, and nothing more; but if the defendant authorized the plaintiff to fill up the endorsement waiving demand and notice, it would bind him that a waiver of demand and notice was no part of an assignment, but that it was an agreement or special contract, that might be incorporated in the assignment, if the parties had made such contract and agreed that it should be so incorporated.

After the jury had retired, they returned into court in a body and enquired of the court whether, if said defendant only said, "fill up the endorsement in any way you think proper," this would authorize him to fill it up, waiving demand and notice. To which the court replied, that it would not.

The jury rendered a verdict for the defendant. A motion was made for a new trial by the plaintiff, and overruled. The plaintiff appealed.

*J. Dunlap and Totten*, for plaintiff in error.

*Fitzgerald*, for defendant.

GREEN, J. delivered the opinion of the court.

The defendant is the payee of a note, executed by John Webb, which he endorsed to the plaintiff. The endorsement was in blank, and it was filled up by the plaintiff, waiving demand and notice. It was proved, that the defendant told the plaintiff he might fill up the endorsement in any way he saw proper. The court told the jury, that if the parties had an understanding or agreement that the plaintiff should fill up the endorsement, waiving demand and notice, the defendant would be bound by it; but that, in the absence of such evidence, the plaintiff could only fill up the endorsement with an ordinary assignment of the legal interest. The jury afterwards came into court and enquired whether, if the defendant said the plaintiff might fill up the endorsement in any way he thought proper, would that authorize him to fill it up waiving demand

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and notice. The court said, that such expressions of a party at the time of making a blank endorsement, would only authorize him to fill it up so as to assign the legal interest.

In this charge there is no error. The contract which is made by the mere endorsement of negotiable paper, and that which was filled up over the name of the defendant in this case, are very different. The blank endorsement would only authorize the holder to fill up the assignment, passing the legal interest to whomsoever he might think proper. Unless the party to whom a note is transferred by blank endorsement be authorized by the agreement of the endorser to insert in the assignment, that demand and notice are waived, he cannot so fill it up. The authority which the law implies, is only a right to fill up the assignment, transferring the legal interest in the paper to whomsoever he pleases. If it is desired that the assignment shall contain any other agreement than the law implies, it must be shown that the endorser authorized such agreement to be inserted.

It is insisted for the plaintiff, that the expression of Lamb to Kimbro, that he might "fill up the endorsement in any way he thought proper," gave Kimbro a right to fill it up waiving demand and notice. We think the opinion of the circuit court is correct upon this point. The express authority here given, is only that which the law implies, and nearly in the language laid down by Chitty. It means only that the holder may use any form of language, in the assignment of the paper to any person he may choose to name as endorsee. But it is insisted that the court charged the jury upon the facts, as well as the law of the case, and that this was error. We do not understand this charge in the least degree trenching upon the province of the jury. The jury enquired whether, if certain words were used by the defendant, they would convey to the plaintiff authority to insert, in this assignment, the contract waiving demand and notice. Here was a fact found by a jury, or hypothetically assumed to exist. The remarks of the Judge, in reply, taking the fact as stated by the jury, indicate his opinion as to whether the words used do, in law, constitute an agreement of the defendant that the plaintiff may write over his sig-

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nature any special contract he may think proper. They were confined strictly to that legal proposition. If the jury had found, that by the use of these words, Lamb intended to convey the authority to Kimbro to fill up the endorsement waiving demand and notice, the previous charge of the court had indicated that he would be bound, and that they must find for the plaintiff. But they propound no such proposition. They ask, whether the words used by Lamb, *per se*, authorized Kimbro to write the special contract over his name. And we think the court answered correctly, that they would not. If the authority existed, to insert in the assignment the words "waiving demand and notice," we do not perceive but that, upon the same authority, he might not have coupled with the assignment any other contract he might have wished. But such unlimited authority is not contended for, and certainly was not conferred.

Let the judgment be affirmed.

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NOTE.—An endorsement which mentions the name of the person in whose favor it is made, is called an endorsement in full; and an endorsement which does not, is called an endorsement in blank. Chitty on Bills, 252.

An endorsement in blank is made by the mere writing of the endorser's name on the back of the bill or note, and constitutes, in itself, a complete and perfect transfer of the interest in the bill or note, and gives the right of action to any *bona fide* holder. Chitty on Bills, 252.

Where a negotiable note is endorsed in blank, the holder may fill it up with any name he pleases, and the person whose name is inserted will be deemed rightfully entitled to sue. 7 Mass. 479; 11 John. 52; 6 Coner. 449; 3 Wheat. 173, 183; 18 John. 230; 2 Humphreys.

## ELLIOTT vs. THOMPSON.

1. In the absence of fraud or eviction the vendee of real estate, in possession under a deed with covenants of general and special warranty, is entitled to no equitable relief on account of outstanding encumbrances or adverse title.
2. It is now well settled, that the vendee of real estate, with covenant of warranty, on eviction, recovers of the vendor, the consideration money and interest.

This bill was filed in the Chancery Court at Sommerville by Elliott against Thompson, administrator of Hopkins, for the purpose of obtaining an injunction against the enforcement of part of a judgment obtained by Thompson, as administrator, against him. Hopkins sold to Elliott a tract of land, which was subject to a deduction of locative claim. Hopkins promised to buy in this claim from time to time, but died without doing so. Elliott retained the land and bought the locator's share at \$1000. Thompson in his answer, alleged that the consideration money and interest, which was about the sum of \$400, was all the abatement complainant was entitled to, and offered in his answer to abate the judgment to that extent and no further.

The facts are more fully stated in the opinion of the court. McCambell, Chancellor gave relief to that extent. Complainant appealed.

*Turley*, for complainant.

*J. C. Humphreys*, for defendant.

REESE, J. delivered the opinion of the court.

Hopkins in 1832 sold and contracted to convey to one Bell, a tract of land of upwards of five hundred acres, at the price of four dollars per acre, and took the bonds of Bell for the purchase money, and gave him a bond or covenant to convey title on the payment of the purchase money. The land in question had, in early times, been entered in the name of David Ross, and no grant at the time of this contract with Bell had been issued to the heirs of Ross. This land had been located by Pillow and Bradshaw, and they or their heirs had an equitable right to one-fifth, or one hundred and sixteen acres, for the

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locative share. It does not appear from the allegations of the bill, or the proof in the case, that Bell at the time of the contract was not well informed of this state of the title. In 1833 or 1834, Elliott, the complainant, purchased the land in question of Bell, and subsequently surrendered to Hopkins the title bond or covenant for a conveyance made by Hopkins to Bell, and subsequently surrendered to Hopkins the title bond or covenant for a conveyance made by Hopkins to Bell and assigned to him, and accepted from Hopkins a deed of conveyance, in which there is no covenant of seizin, or for further assurance, or to remove incumbrances, but a covenant merely of general warranty as the title, and of special warranty against any claims of the heirs of Pillow and Bradshaw. Complainant gave to Hopkins his bonds for the amount contracted to be paid by Bell, and the bonds of Bell were surrendered to him by Hopkins. At this time complainant knew the claim of Pillow and Bradshaw for a locative share in the land, and was not ignorant, as we think from the proof, of the general state of the title. Hopkins in his life-time, although proposing and promising to do so, did not complete any negotiation with Pillow and Bradshaw for the extinguishment of their equitable title to a locative share. The administrator of Hopkins brought suit for the balance of the consideration and obtained judgment; and complainant filed this bill of injunction. The administrator in his answer, offers and agrees to an abatement of his judgment at law, on the ground of the locative share of Pillow and Bradshaw, although there had been no recovery or eviction by them against the vendee of his intestate, the complainant, to the amount and extent of the value of the locative share, as fixed by the terms of the sale to Bell; or, in other words, to abate the consideration money and interest of the one hundred and sixteen acres. Complainant subsequently filed a supplemental bill, alleging that he had purchased and paid for the locative share; and that it cost him the sum of one thousand dollars, and he claims an abatement to this extent.

Two questions have been discussed. 1st. The jurisdiction of a Court of Chancery to grant any relief under the circumstances of this case? and 2dly. If relief can be granted, what

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shall be the extent of that relief? We have considered the evidence with some care, and are satisfied that it does not establish fraud against Hopkins; and in the absence of fraud or eviction, the vendee in possession under a deed, with covenants of special warranty, is entitled to no equitable relief on account of the outstanding encumbrances or adverse title. No conversations of Hopkins proved in the record, as to his purchasing the locative share, either by their own proper force, or in connection with the covenant of special warranty, if they could be so connected, constitute a ground upon which the court could rest the jurisdiction of a Court of Chancery to enforce the specific execution of contracts, according to the course of the court in such cases.

1. If it were not, then, that the administrator of Hopkins has in his answer offered to abate, and submitted to an abatement on the ground of the locative share, it would be difficult indeed to maintain the jurisdiction of the court in the present case.

2. There can be no doubt as to the extent of the relief to be granted. In this case, equity must follow the law.

If Pillow had recovered his locative share from the complainant, and evicted him from the one hundred and sixteen acres, complainant could, at law, in an action of covenant for the breach of the warranty of his deed, have recovered against Hopkins the consideration money, only, and the interest thereon. The earlier cases on this subject, in this State, are marked by some fluctuation in the principle of compensation. But the question has been fully settled, and for a considerable length of time, in favor of the consideration price, and against the value at the eviction. Particular cases have arisen, and will rise, where the enforcement of the one rule or the other would fall short of or exceed the just claims or liabilities of the one party or the other. But having established a general rule on the subject, it is our duty on grounds alike of justice and policy, and in courts of equity as well as in courts of law, inflexibly to adhere to it. The inconvenience arising from its practical enforcement can be readily obviated by the purchaser insisting upon the insertion of further covenants in the deed; as of seizin; to remove encumbrances; for further assurances, &c.

[Mays vs. Jennings.]

The Chancellor, in this case, gave relief to the extent submitted to in the answer of the administrator. So far was proper, and we affirm the decree.

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MAYS vs. JENNINGS.

1. Mays, for a stipulated consideration, covenanted to deliver a given number of barrels of corn to Jennings, and Jennings bound himself to furnish sacks to put the corn in. Jennings delivered the sacks, which were received, and Mays failed to deliver the corn or return the sacks. Held, that in a suit on the covenant for a breach thereof in not delivering the corn *sacked*, the value of the sacks detained was proper to be considered in estimating the damages.
2. Where a covenant was made for the delivery of a given number of barrels of corn, the quantity should be ascertained by the bushel measure as fixed by law, and not by weight and evidence of a neighborhood custom, which cannot be permitted to control the law.

Jennings instituted an action of covenant in the Circuit Court of Gibson county, against Mays. The declaration avers the making of an agreement on the 10th day of April, 1841, signed and sealed by the plaintiff and the defendant; that defendant bound himself to deliver to Jennings by the first day of December next thereafter, at Eaton, in the county of Gibson, at one dollar per barrel, all the corn that the defendant should make, except enough for his own use, which was to be one hundred and seventy-five barrels, if he did not make a full crop, and two hundred if he made a full crop; that the corn should be thrashed and sacked; and that the plaintiff Jennings bound himself to deliver the sacks at Eaton by the time specified, and to execute his notes for the purchase money on the day of the delivery of the corn, payable on the 15th day of February next thereafter. The declaration further avers, that the defendant did produce, during the ensuing season after the execution of the covenant, a large and full crop of corn, and had for sale, after reserving for his own use the number of barrels specified in the article of agreement, — barrels; that he (plaintiff) furnished the sacks according to agreement, and that he was at Eaton at the time specified, ready to receive the said corn and execute his



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notes according to contract; that defendant received the sacks and sacked the corn, and refused to deliver it.

The defendant pleaded "covenant performed," and leave was "given to each party to give in evidence any matter that could be specially pleaded."

There was an issue on this plea submitted to a jury at the July term, 1842, Harris, Judge, presiding. The covenant was read to the jury, sustaining the description thereof in the declaration, and proof was introduced showing that Jennings had delivered to Mays, on the 6th day of December, 1841, seven hundred and fifty sacks; that the sacks were worth in Gibson twenty cents each, weighing two pounds each. To this proof as to the value of the sacks the defendant objected, on the ground that they were not recoverable in this action. After the corn was sacked, the defendant offered to deliver it to the plaintiff, the quantity delivered to be ascertained by weight, estimating fifty-two pounds to the bushel, or two hundred and sixty pounds to the barrel, exclusive of the sack. The plaintiff refused to receive the corn by weight, but required that the quantity of corn should be ascertained by measuring it in a bushel or half bushel measure. The corn was not, for this alleged reason, delivered: the defendant then offered to return the sacks: plaintiff refused to receive them, saying he would make the defendant pay for them at twenty cents per sack. Defendant then offered the value of seven hundred and fifty sacks at twenty cents each in Tennessee bank paper, to which plaintiff replied that bank paper was not a lawful tender.

The defendant proved by several traders and planters, that the mode adopted for ascertaining the quantity of corn was this; when a contract was made for the delivery of a given number of barrels of corn, to be thrashed, sacked, and delivered at Eaton, the quantity of corn was ascertained by weight at fifty-two pounds as a bushel thereof, or two hundred and sixty as a barrel thereof. It was also proved, that this was the mode adopted not only at Eaton, but along the whole course of the Mississippi, and at New-Orleans, when the corn was intended to be shipped for sale. It was also proved, that on an average the result would be near about the same, whether weighed at fifty-two

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pounds as a bushel or measured by the bushel measure; that flint corn would weigh from fifty-four to fifty-seven pounds to the bushel, and the ordinary corn of the country would weigh about fifty-two pounds to the bushel.

It appeared that corn was worth about one dollar and twenty-five cents per barrel that season, and that the defendant sold his corn at one dollar and twenty-five cents per barrel by weight, part in cash and part on credit.

The defendant requested the court to charge the jury, that if they believed, from the evidence, that it was the understanding of the parties, on making the contract, that the quantity of corn delivered should be ascertained by weighing it, estimating fifty-two pounds as a bushel, or two hundred and sixty pounds as a barrel, that the jury should be governed by such understanding in making up their verdict. This the court refused to charge, and charged the jury that the mode of measurement was prescribed by law to be by the bushel measure and not by weight, and that the jury would be governed by this rule and no other; that the covenant fixed the understanding of the parties, which the court would construe for the jury to mean by the bushel and not by weight, and that the jury should so consider it.

The defendant also requested the court to charge the jury that the value of the sacks was not recoverable in this action; but the court charged the jury that the value of the sacks was recoverable in this action, and that the declaration was sufficient to authorize it, leaving the facts to be ascertained by the jury.

The jury returned a verdict for the plaintiff, for the sum of two hundred and twenty dollars. The defendant moved the court for a new trial. The motion was overruled, and judgment rendered on the verdict. The defendant appealed.

*R. P. Ruines*, for the plaintiff in error.

1. The plaintiff in error was not entitled to recover the value of the sacks. They are not embraced in the covenant of the defendant. He did not covenant that he would pay for a given or any number of sacks. He covenanted to deliver corn, and the covenant extends no farther than to render him liable for

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damages arising out of the breach of the contract in not delivering the corn. Although the sacks came into the possession of the defendant under the covenant, the covenant did not provide for the contingency which arose eventually, to wit, the non-delivery of the corn and non-return of the sacks. The extent of the plaintiff's right of recovery and extent of defendant's liability is limited to the terms of the covenant.

2. The court charged, that it was the province of the court to construe the written covenant of the parties, and this covenant meant that the corn was to be measured by the bushel measure. He did not controvert the first position, but insisted that each party had agreed that so many barrels should be delivered; and that the question as to what quantity a given number of barrels would contain, was not fixed by the covenant, but was an open question to be fixed by the contract of the parties, expressed or implied, which could be ascertained by reference to the uniform usage and established custom of the country, as understood by merchants, planters and traders of the country where the corn was sold, and to which it was to be shipped. The parties not having entered into any express contract as to the mode of ascertaining the number of barrels, the presumption necessarily arises, that they intended to contract and deal according to the general usage, practice and understanding in relation to sales of corn. *Smith v. Wright*, 1 Caines' Rep. 13; *Barber v. Bruce*, 3 Conn. 9; *Douglas*, 519; 5 *Munford*, 483; 5 *Binney*, 287.

*Crocket*, for the defendant in error.

*Totten*, for the plaintiff in error.

TURLEY, J. delivered the opinion of the court.

This is an action of covenant, brought by the defendant in error, to recover damages against the plaintiff for the nonperformance of a contract made on the 10th day of April, 1841, by which he promised to deliver to him, at one dollar per barrel, all the corn he might raise to spare that year, thrashed

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and sacked, by the first day of December, Jennings furnishing the sacks. The proof shows, that seven hundred and fifty sacks were accordingly furnished, worth about twenty cents apiece; that the corn was sacked by Mays and tendered to Jennings; but that Mays, instead of measuring the corn by the bushel measure, refused to deliver it but by weight of fifty-two pounds to the bushel, two hundred and sixty to the barrel, which was refused by Jennings, and thereupon Mays sold the corn to another, by weight, at one dollar and twenty-five cents per barrel. There was proof introduced, showing that corn was often sold and delivered in that neighborhood by weight, and that there was but little difference in the quantity as ascertained by weight and measurement. The court charged the jury, "that the value of the sacks was recoverable in this action; that the evidence establishing the mode of measurement was incompetent; that they must not be governed by it, but consider it rejected; that the mode of measurement was prescribed by law to be by the bushel, and not by weight." This charge is objected to upon both points, but we think without success. On the first point, by the terms of the contract the sacks were to be furnished by defendant in error, to be returned to him filled with corn. They were furnished and not returned, and of course, in estimating the damages for the breach of the contract, their value must be taken into consideration. On the second point, a barrel, dry measure, is by law fixed at five bushels, and not at two hundred and sixty pounds; and if a contract is made for so many barrels of corn, the purchaser is entitled to receive it by the bushel, unless he contract otherwise. Proof of a neighborhood practice cannot alter the law. Judgment affirmed.

**NOTE**—On demurrer to a plea, stating a custom in Southampton, that any pound of butter exposed to sale in the markets of said town should and ought to weigh eighteen ounces; it was contended, that the custom was contrary to the law of the land and statutes, which direct that every pound should contain sixteen ounces.

*Per cur.* We are not called upon to decide whether a custom to sell butter in lumps of any particular weight is good or not. The question is, whether, when a person is selling butter under the specific denomination of a pound, he shall be compelled to sell more than a pound. Butter is described to be sold by avoirdupois weight, by which a pound of butter weighs sixteen ounces: then how can a person who professes to sell a pound of butter be obliged to sell more than a pound? It might as well be argued, that a custom might prevail in a particular place that a less number of days than seven should

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make a week, or that a less space of ground than an acre should be an acre. Such a doctrine is absurd. *Noble v. Durrell*, 3 Term Rep. 271.

See Tomlin's Law Dic. title *Measures*, Petersdorff, vol. 15, page 391; 6 Coke, 67. Magna Charter ordains (ch. 25) that "there shall be but one measure throughout England, according to the standard in the Exchequer." 4 Inst. 273. In 5 Geo. 4, an act was passed, ascertaining and establishing uniformity of weights and measures.

At the organization of the federal government, authority was conferred upon congress to establish a uniform system of weights and measures. But, surprising as it may appear, no laws have as yet been enacted by that body for the perfection of so important an object. Some measures have been taken to obtain information on the subject, and able reports have been made by Messrs. Jefferson, Adams, and Hassler. By an order of congress, June 5, 1836, a set of standard weights and measures, similar to those in use in England anterior to the passing of the 'Act of Uniformity' in May, 1834, have been prepared by Mr. Hassler for the use of each customhouse, and for each state. Hence, the old measures of England, superseded by the imperial system, with such modifications as local customs or state laws have ingrafted upon it, may be regarded as the general standard adopted in this country.

Most of the states of the Union have attempted to reduce their standards of weights and measures to a uniform system, and numerous laws have been enacted with that view; but so far from succeeding in their object, they have had, in most instances, an opposite effect. There are but few states in which the proportions of their measures are required by law to be the same—lineal, superficial, and cubic measures excepted—although they may bear the same names; and owing to the difficulty of enforcing new regulations, strong prejudices against any innovation, and a constant influx of settlers from one state into another, and from various countries of Europe, who bring their own accustomed weights and measures, uniformity cannot be said to exist in any state of the Union. In this country, as did England and France before their new systems were adopted, local consumers do not feel the whole disadvantage of this confusion; but merchants and others, who make large sales or purchase in different parts of the country, often experience serious difficulties in converting to their own local standards the quantities expressed according to another rate. The proportion which one standard bears to another is not always easily obtained; and when it is, the calculations to be made are often long and difficult, and may not always give an accurate result.

Hunt's Merchants' Magazine, vol. iv. page 344. McCulloch's Commercial Dictionary, page 370.

**CARRAWAY vs. BURTON.**

In actions of indebitatus assumpsit and debt upon executed contracts the plaintiff may relinquish part of his claim, with a view to give a Justice of the Peace jurisdiction, and recover judgment for the balance. The judgment recovered is a bar to a suit for the part relinquished, if pleaded.

Burton was indebted to one Edmonson \$51; Carraway was requested by Burton to let Edmonson have \$51 worth of bacon which, when delivered, should discharge the debt due to Edmonson, Burton agreeing to pay Carraway the \$51. The bacon was delivered according to the contract.

When the \$51 fell due, Carraway instituted suit, by warrant, before a Justice of the Peace for Gibson county, against Burton. Burton was summoned to answer Carraway "of a plea of assumpsit under fifty dollars."

Judgment was rendered in favor of plaintiff for \$49 50, and the defendant appealed to the Circuit Court. The case was submitted to a jury at the July term, 1842, Harris, Judge, presiding. He charged the jury, that a Justice of the Peace had no jurisdiction, and a verdict was returned in favor of the defendant. A motion for a new trial was made and overruled, and judgment rendered, from which the plaintiff appealed.

*R. P. Raines*, for the plaintiff. He admitted that the jurisdiction of a Justice of the Peace, on a case like the present, did not exceed fifty dollars. But the plaintiff did not by his warrant demand fifty dollars. He demanded less than that sum, and he had recovered a judgment for a less sum. He had by his warrant relinquished a part of his demand, and he had a right to do so, and recover for the balance. This was a case where the suit was brought upon a consideration which was past. The bacon had been delivered, and the defendant was bound to pay him fifty dollars therefor, or such less sum as he might choose to demand. This was not a special action of assumpsit, but an indebitatus assumpsit, on a contract executed on the part of the plaintiff. The action is special when the plaintiff declares upon the original agreement, setting forth the particular language in which it is expressed, or stating the legal effect and operation of it; thus making the special contract the

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foundation of the suit, as where he declares upon a bill of exchange, promissory note, policy of insurance, guarantee, wager, warranty, or other similar undertakings. The action is general when the plaintiff, instead of setting out the particular language or effect of the original contract declares, as for a certain debt arising out of the execution of the contract where that constitutes such a debt, or when the promise is raised or implied by law upon the execution of the contract, where no specific sum is stipulated to be paid; in which case the law implies that so much is to be paid as shall be reasonably due; hence it is a rule, that so long as the contract is executing, the party must declare specially, but when it is executed, he may declare generally. Petersdorf, vol. 2, p. 417.

In this form of action and character of claim, the proof need not correspond with the allegations, and the plaintiff had the right to go for less than his real claim, and to recover so much as he demanded. Starkie, vol. 1, p. 96; vol. 3, Title Variance, 1538.

*A. W. O. Totten*, for the defendant. The justice had no jurisdiction of the subject matter. The demand was certain, one and single for \$51. It appeared in proof, that the justice had no jurisdiction, and this was ground for non-suit.

The demand could not be split, and there was and had been no release of any part of it. The amount of excess above the jurisdiction does not change the principle, whether it be one dollar or one hundred dollars. A suit for part is not on any principle a release of the balance; nor does a recovery of part by suit, differ in this respect from a receipt of part by a demand and without suit. The only difference is, as to the mode of making the demand.

The form of action cannot be material; it is *indebitatus assumpsit*. It applies to many special contracts, as to notes, bills of exchange, &c. The contract in the present case, is as special as those, although in parol.

If the proof had been a note for \$500, could plaintiff have recovered \$50, or any sum less than the whole; or would it not have been a ground of non-suit at the trial?

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But if part could be recovered, would the balance be, on that account, released? If not the cause of action would be split into two or more causes of action, which is inadmissible.

TURLEY, J. delivered the opinion of the court.

This action was commenced before a Justice of the Peace; the defendant was summoned to answer in a plea of assumpsit, under fifty dollars. Upon the trial in the Circuit Court, it appeared that the defendant, Burton, was indebted to one Wm. Edmonson in the sum of fifty-one dollars; that he requested the plaintiff, Carraway, to pay the amount to him in bacon, which was done; and this constituted the subject matter of controversy. The court charged the jury, that a Justice of the Peace had no jurisdiction of the case, and could, therefore, give no judgment on it; and they must find for the defendant, which they did, and judgment was given accordingly; to reverse which this writ of error is prosecuted. Is this charge correct? It is argued that it is; that the contract and promise is an entire thing, not capable of being severed; and being for an amount beyond the jurisdiction of a Justice of the Peace, the action brought thereon is *coram non judice*, and not maintainable. That a contract is an entire thing, and that the plaintiff will not be permitted to vex the defendant by splitting it, and instituting separate suits thereon, is too well settled, both upon reason and authority, to admit of controversy. *Smith vs. Jones*, 15 Johnson Rep. 229; *Farmington vs. Smith & Payne*, *ibid*, 432. But is this principle applicable to the case under consideration? We think not. The plaintiff's claim has not been split, and separate suits instituted thereon; but the action has been brought for less than he might have demanded upon his contract. And the question is whether this course of proceeding is sustainable. In special actions of assumpsit upon executory contracts, the contract must be set forth in the declaration as it exists, or there will be a variance between the contract as described and proven, which is fatal upon demurrer, if the variance appear of record, and by non-suit, if it appear in proof. But this principle is not applicable to actions of debt and indebitatus assumpsit upon



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executed contracts, viz, contracts in which the consideration is past, and the party bound to pay a specific sum *in numero* therefor. In the first class of cases the damages being unliquidated, no specific sum *in numero* is demandable; the value of the consideration paid, is not the thing sued for, but the amount of the injury sustained by the plaintiff by reason of the breach of contract on the part of the defendant. In the second class the damages are liquidated, and a specific sum *in numero* is demandable; the value of the consideration paid is the thing sued for, and the value is fixed either by the parties themselves when there is an express promise to pay a price agreed on, or by law upon the proof of value when the promise is implied to pay *quantum meruit*. The consequence is, that in the first class of cases the action is based directly upon the contract and breach, and the proof of the contract must correspond with the allegations. But in the second, the goods or labor of the plaintiff having been appropriated by the defendant, he is *ex equo et bono* bound to make him compensation therefor; and his promise to do so arising out of his liability is collateral thereto, not the direct basis of the suit which is the goods, wares and merchandize, sold and delivered, or the work and labor done; and, therefore, the proof of the promise to pay need not correspond with that alledged in the declaration, and a variance is not fatal, but one amount may be sued for and a different one recovered; or in other words, the plaintiff will recover according to his proof, without regard to his allegations, for whatever amount of goods may have been sold and delivered, or work and labor done, provided the damages claimed will cover the amount. The consequence is, that a plaintiff may demand in his suit more than is due him, and recover what is due; and that he may, if he please, demand less than is due him, and recover his demand; and that a judgment in either case is a bar to any other suit upon the same demand, and so are the authorities. *Smith* brought two actions against *Jones* for three barrels of potash, which the proof showed to have been all sold at the same time. It was held that this was an entire contract, upon which two separate suits could not be brought, 15 Johns. Rep. 229. The case of *Farmington & Smith vs. Payne*, 15 Johns. Rep. 432, was an

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action of trover for a bed. The defendants pleaded that judgment had been rendered against them in another action for the same act and subject matter complained of in the present suit. The judgment referred to was an action of trover between the same parties for three bed-quilts, and the proof showed that the bed and bed-quilts were taken by the defendants at the same time, constituting one trespass. Upon this plea the court said, "We are clearly of opinion that the judgment in the first suit was a bar to the plaintiff's claim in this action. The seizure of the bed and bed-quilts which then lay on the bed, was one single indivisible act, and the plaintiff ought not to be permitted to vex the defendant by splitting up his claim for damages into separate suits for each article so seized; there is no difference in this respect between the actions of trover and trespass." In the case of *Smith vs. Jones*, the court decided, that when goods were sold at one time "on an entire contract, the vendor could not maintain separate suits for separate parcels of the goods so sold and delivered. There is no reason for a difference in the rule between torts and contracts. Suppose a trespass or a conversion of a thousand barrels of flour; would it not be outrageous to allow a separate action for each barrel?" In the case of *Phillips vs. Berrick*, 16 Johns. Rep., it is held, that a record of a former recovery apparently for the same cause of action as that which is the foundation of a subsequent suit, is *prima facie* evidence that the demand had been tried, which may be repelled by proof. Spencer in delivering the opinion of the court, says: "There are some principles which have been urged in the argument admitting of no doubt. When for instance, a demand of a party is submitted to a jury, and they see fit to disallow it, either for want of sufficient proof, or any other cause, a verdict and judgment thereon is conclusive, and the same demand is barred forever. So also, if the plaintiff's demand consist of a claim indivisible in its nature, as in the case of *Farmington vs. Payne*, and *Smith vs. Jones*, we hold that the party could not be vexed by having the claim split up into separate suits, and that they could not be maintained." In the case of *Markham vs. Middleton*, 2d Strange, 1259, the plaintiff sued for an apothecary's bill, and on executing the writ of enquiry,

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by accident, he was unprepared to prove the bill. The sheriff thought he could not adjourn, and the jury gave nominal damages. The court thought it hard that the plaintiff should be paid a large debt with a penny, as they said he would be, if this verdict stood, and set aside the inquisition. Lord Kenyon in speaking of this case, says; "the plaintiff had but one demand, and though the jury gave inadequate damages, he would have been bound by the verdict if it had stood." The result of these authorities is, that if a plaintiff bring a suit for his entire cause of action, and fails or neglects to prove it in whole or in part, and judgment goes accordingly, or a suit for a part only of his cause of action, and obtains judgment for that part, he can never sue again on the same cause, but the judgment so obtained may be pleaded in bar to any suits arising out of the same transaction.

The charge of the Circuit Judge, then, in the case under consideration, non-suiting the plaintiff is erroneous, and the judgment will be reversed, and the case remanded for a new trial.

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*LOVE vs. HARPER et als.*

1. The lien of a judgment upon real estate given by the act of 1831, ch. 90, sec. 7, is not lost or suspended by an agreement of record between plaintiff and defendant to stay execution for four months.
2. Plaintiff and defendant agreed to stay execution for four months, and the execution was returned, stayed by order of the plaintiff: Held, that the lien of the judgment upon the real estate of the defendant was not lost or suspended by such stay of execution, so as to give other judgments, recovered at the same term, a preference.

*Mumford*, for the plaintiff.

The record does not show who appeared for defendant.

GREEN, J. delivered the opinion of the court.

This is a motion against the sheriff of Tipton county, for money in his hands which was made by the sale of the real and

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personal property of Robert B. Jones, by virtue of several executions in favor of different plaintiffs.

The record discloses the following facts. At the February term, of the Circuit Court of Tipton county, 1840, Love recovered three judgments against Jones for \$1950 in all; and on the record, in each case, an entry is made, "Execution stayed four months." At the same term of the court, Woodson recovered a judgment against Jones for \$258, and in this case, also, execution was stayed four months. On the same day, Harper, Eppes & Jones recovered a judgment against the same defendant for \$5598 97, upon which there was no agreement of record to stay execution. At June term, 1840, of the same court, John W. Jones recovered a judgment against the same defendant for the sum of \$2923 96. An execution was issued on Harper, Eppes & Jones' judgment, from the February term, returnable to the June term of the court, but it was returned, "Stayed by order of the plaintiff."

On all the above judgments, executions were issued, bearing test of June term, 1840, and returnable to October term. On these executions personal property was sold, producing the sum of \$2804 42. After the October term, executions were again issued on all the judgments returnable to February term, 1841, and were levied upon the lands of the defendant, which were sold for the sum of \$5100.

The Circuit Court ordered, that the proceeds of the personal property be paid *pro rata* to the several plaintiffs, whose executions were in the hands of the sheriff at the sale thereof, and bearing test of the same court; and that the money arising from the sale of the real estate be first applied to the satisfaction of the judgment in favor of Harper, Eppes & Jones, and that the residue, if any, be applied *pro rata* to all the other executions.

From this judgment the plaintiff in error, Love, appealed to this court. And the question now is, whether the agreement of record, in the cases of Love vs. Jones, and of Woodson vs. Jones, that execution be stayed four months, suspended the lien of their judgments on the lands of Jones for that period, and thereby gave to Harper, Eppes & Jones' judgment, which was recovered at the same term, a priority of lien.

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It is insisted by the counsel for Harper, Eppes & Jones, that they have priority of lien on the real estate of the defendant, R. B. Jones, because an order, by consent, was entered of record, suspending the issuance of an execution on Love's judgment, and on Woodson's judgment for four months; and the case of *Scriba vs. Deans*, 1 Brockenbrough's R. 166, and the case of *Cocke vs. Porter*, Peck's R. 33, are referred to in support of this proposition. In the case of *Scriba vs. Deans*, Chief Justice Marshall decided in the Circuit Court for the District of Virginia, that as the lien of a judgment was unknown to the common law, and was not expressly given by any statute, but had been construed, by the court, to exist by virtue of the statute of Westminster the 2d, (13 Edward 1st, ch. 18,) which gave the *elegit*, as a consequence of the suspension of a right to sue out that process, the lien of the judgment is also suspended. The same doctrine was held by him afterwards, in the same court, in the case of the *United States vs. Morrison et al.*; in support of which, the reasoning is very persuasive. In that case the *United States* had sued out a *fiery facias* upon their judgment, and the remedy was not exhausted at the date of the deeds of trust under which the defendants claimed. In the opinion of the Circuit Court, the United States could not at the date of the deeds have sued out an *elegit*, and as the lien is a mere consequence of the right to take out an *elegit*, that court was of opinion that it did not overreach a conveyance made when this right was suspended. But this decision was reversed in the Supreme Court, (4 Peters R. 124,) on the ground, that the Court of Appeals of Virginia, (*Coleman vs. Cocke*, 6 Randolph's Rep. 618,) had decided, that the right to take out an *elegit* is not suspended by suing out a *fiery facias*, and consequently the lien of the judgment continues pending the proceeding on that writ.

In the argument of the case of the *United States vs. Morrison*, the Attorney General cited a case, (*Fox vs. Rootes*, not reported,) decided by the Court of Appeals of Virginia, in which it was held, that a judgment creditor is entitled to priority over a subsequent incumbrancer, though his judgment had been rendered many years before, and no execution had ever issued on it, and of course no execution could issue until revived by *scire*

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*facias*. But the Supreme Court of the United States, in delivering the opinion, do not seem to yield to the doctrine of the case above cited, but reverse the judgment of the Circuit Court, on the ground that the right to sue out the *elegit* was not suspended by suing out the *fieri facias*, and consequently the lien of the judgment continues. In the same case, (*United States vs. Morrison*,) Judge Marshall says: "There is no statute in Virginia, which in express terms makes a judgment a lien upon the lands of the debtor. As in England, the lien is a consequence of a right to take out an *elegit*, during the existence of this right, the lien is universally acknowledged. Different opinions seem at different times to have been entertained of the effect of any suspension of the right."

It is manifest, that if in England and Virginia, the lien of a judgment is a consequence of the right to take out an *elegit*,—the cases which determine that a suspension of that right is a suspension of the lien,—can have no weight in determining the question before us, namely, whether a suspension of the right to take out an execution, is a suspension of the lien which is given by our act of 1831, ch. 90, sec. 7. That act provides, that "all judgments obtained in any courts of record in this State shall be a lien upon the debtor's land from the time said judgment was rendered: *Provided* said judgment is rendered in the county where the debtors reside at the time of the rendition; and, *provided*, an execution is taken out upon said judgment, and said land sold within twelve months after the rendition."

Here the lien is not the result of judicial construction; nor does it depend upon the right to sue out any process, but it is *expressly* given by the statute, which declares it shall exist for one year by force of the judgment alone.

The very argument which proves, that a lien, which exists only because of the right to sue out the *elegit*, is suspended, whenever the right to that process is suspended, equally proves, that a lien which the statute expressly declares shall exist by force of the judgment alone, cannot be suspended by reason of a suspension of the right to sue out an execution, upon which its existence does not at all depend.

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It is true, that our predecessors in this court, in the case of *Cocke vs. Porter*, (Peck's R. 33,) held, that the lien which the courts in England construed to exist by virtue of the statute of Westminster the 2d, did not depend upon the *elegit* which was given by that statute; and yet they held, that a suspension of a right to sue out an execution, was a suspension of the lien of the judgment. But, with deference, the reasoning in that case is unsatisfactory and inconclusive. Why the lien of the judgment should be suspended, because of an agreement to stay an execution, when its existence does not depend upon the right to sue out process of execution, it is not easy to perceive. But it is believed the court, in that case, was in error, in supposing that the lien derived by construction of the statute of Westminster the 2d, did not depend upon the *elegit* which was given by that statute, and that the Supreme Court of the United States is correct, in referring the existence of such lien to the use of the *elegit*. That statute, (13 Edward 1st, ch. 18,) provides, that "when debt is recovered or knowledged in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages to have a writ of *fieri facias* unto the sheriff, for to levy the debt of the lands and goods, or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and the one-half of his lands until the debt be levied upon a reasonable price or extent." Now, as at common law, a judgment did not bind the lands, and as the lien is the creature of the courts, derived by construction of this statute, giving the creditor his election to take half the lands, the court holding purchasers to constructive notice of the judgment, it is clear that the lien is dependent upon the *elegit* here given. Whether a suspension of the immediate right to sue out the *elegit*, would suspend for such time the lien, Judge Marshall says, (*United States vs. Morrison*,) "Different opinions seem at different times to have been entertained." But be this as it may, there is no doubt, but that a lien which a statute expressly declares shall exist by virtue of a judgment, cannot be suspended by a voluntary agreement of record to suspend for a time the issuance of an execution.

We are of opinion, therefore, that the order suspending the

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issuance of execution for four months, which was made by consent in the cases wherein Love was plaintiff, and in the case wherein Woodson was plaintiff, did not have the effect to suspend the lien of those judgments during that period, but that they are entitled to satisfaction according to their priority, as though the execution had not been stayed.

As it regards the monies which were produced by the sale of the personal property of the defendant, Jones, the court was correct in ordering it to be paid to the several creditors *pro rata*. The executions were all in the hands of the sheriff at the same time, and bore test of the same term of the court.

The judgment of the Circuit Court will be reversed, and judgment entered according to the rights of the parties as declared in this opinion.

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#### ISLER *et als.* vs. OUTLAW.

Bryan gave Outlaw a bond to convey him six hundred and forty acres of land, section 15. They subsequently made a verbal agreement, that the bond should be discharged by conveyance of section No. 14, instead of 15, and Outlaw took possession of it. Isler, his son-in-law, his daughter, (she being the only heir,) and his widow, refused to convey either. Outlaw sued on the bond, and the defendant Isler, as administrator of Bryan, pleaded lunacy of obligor. Judgment was rendered, and thereupon the son-in-law, the daughter, and widow of the deceased, filed their bill to enjoin the judgment, and compel Outlaw to accept in discharge thereof section 15. Held, that they were not entitled to the relief prayed for.

This bill was filed in the Chancery Court at Somerville, in January, 1842, by Isler, administrator of the estate of Joseph H. Bryan, deceased, by Sally A. Bryan, the widow of said Bryan, and Mary Isler, the daughter of Bryan and wife of Isler the administrator, against Joseph B. Outlaw. It was filed to restrain the collection of a judgment which Outlaw had recovered in the Circuit Court of Fayette county, against Isler, as administrator of Bryan, and to compel Outlaw to receive a deed for six hundred and forty acres of land in lieu of said judgment.

The bill alledges, that on the 2d day of July, 1839, Joseph H. Bryan executed and delivered to Joseph B. Outlaw a bond



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for title to six hundred and forty acres of land lying in Tippah county, state of Mississippi, part of a fourteen hundred acre tract; also certain mills, called Davis's mills, in the same neighborhood; that this bond was, without a valuable consideration, paid, or agreed to be paid, but upon condition that said Outlaw, then a resident of Raleigh, North Carolina, should remove to the Western Division of the state of Tennessee, and reside at Lagrange, or in its vicinity; that during the absence of said Bryan, complainant Isler having an opportunity to sell the said section of land to W. D. and W. B. Davis, did make a contract to convey the same, subject to the ratification of said Bryan on his return; that Outlaw arrived at Lagrange on the 10th of December, 1839, and was then informed that said section of land was sold; that said Bryan informed Outlaw that he could have section 14, which adjoined section 15, and was a part of the fourteen hundred acre tract; that Outlaw examined section 14, pronounced himself satisfied therewith and took possession of it, instead of No. 15, and made a crop thereupon; that Bryan died on the 27th day of December, 1839, and complainant Isler administered on his estate; that Outlaw never procured the bond for title to said section 15 to be registered, so that the administrator could make a title, but that the title was otherwise free from embarrassment; that on the 14th day of April, 1841, Outlaw, (he being still in possession of section 14,) instituted an action of covenant, against complainant Isler as administrator, on the title bond, averring as a breach the failure of said Bryan in his lifetime to convey section fifteen as therein stipulated, and at the January term, 1842, recovered a judgment against the administrator; that after the commencement of said suit, the complainants, being desirous of complying with said title bond, procured a rescission of the contract with the said W. D. and W. P. Davis, and executed a deed of conveyance in fee simple to said Outlaw, and tendered it to him, which he refused to accept, but prosecuted his suit on the bond to judgment, as before stated, he being at the same time in possession of section fourteen, under an agreement to accept it in place of section fifteen.

The bill prays that he, Outlaw, be made defendant, and that he be compelled to accept a deed from complainants, or that

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the title of complainants be vested in defendant, and that the judgment recovered be perpetually enjoined, &c.

Outlaw replied, and stated that Bryan had made, in Raleigh, N. C. a bond to convey to him six hundred and forty acres, as stated in the bill, part of a fourteen hundred acre tract, which included sections number fourteen and fifteen, lying in Tippah county, Mississippi; that said six hundred and forty acres was to be laid off in a body so as to include the improvements on the tract, and also to include in said bounds Davis's mill, as stated in the bill; that the condition of the bond was, that he should remove, with his family, to the western district of Tennessee, and reside at Lagrange or its vicinity, and that he had fulfilled the conditions; that the removal had involved some sacrifice on his part, and constituted not merely a good but valuable consideration to sustain the covenant; that when the bond was executed, J. H. Bryan requested complainant Sally A. Bryan to write to Isler, informing him of the fact and direct him not to sell the land; that he believed that the letter was received, and that Isler, by collusion with W. D. and W. P. Davis, made the pretended sale for the purpose of defeating the contemplated conveyance of the land; that on his arrival in the State of Tennessee, he was informed by J. H. Bryan, that the land had been sold, and that he wished him to examine the adjoining section and take that in lieu of the other, if it pleased him; that he examined it and found it greatly inferior to section fifteen; that on section fifteen the buildings were good, and there were one hundred and seventy acres of cleared land; on section fourteen the buildings were not good and there were only fifty acres of cleared land; but out of regard for the feelings and health of J. H. Bryan, (his uncle,) he professed to be satisfied with section fourteen, and took possession of it: that during the few days that Bryan lived after this, no written agreement was made in reference to the substitution of section fourteen for section fifteen, and that under this verbal agreement he continued in possession of it two years; that he prepared a deed for number fifteen, in conformity with the title bond, and requested Isler to have it signed, but this he refused to do, declared that he would make a conveyance for neither section, and that Sally

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Bryan and M. Isler were more opposed to the execution of the deed than himself; that Bryan was of unsound mind at the time of the execution of the bond; that he thereupon commenced suit on the bond; that defendant pleaded that Bryan was insane at the time of the execution of the bond, and he recovered judgment as stated; that he admitted that Isler did, after the commencement of the trial, when all the proof was heard, come to the defendant with some papers in his hand, alledging that he had a deed to defendant for the land in question, and that without examining the papers he refused to receive the alledged deed, because, 1st, he had been forced to abandon section fourteen, after having made valuable improvements on it: 2d, it had greatly depreciated in value by the change of the times; and lastly, because he had been put to great trouble, and expence and delay in prosecuting his suit. He stated farther, Isler did did not tender a deed for Davis's mills in accordance with the bond.

In addition to the facts stated in the bill and admitted in the answer, it appeared that Isler sold section fifteen to W. P. and W. M. Davis, and gave a bond for title for part to them and part to one Yancy, both bonds dated on the 7th day of September, 1840; that a parol agreement was made by Outlaw and Bryan, by which section fourteen was substituted in the place of section fifteen; that Outlaw took possession; that Outlaw applied for title to section fourteen to Isler and the widow, who refused to convey either fourteen or fifteen. Thereupon Outlaw removed from the land and commenced suit at law on his bond, on the 14th day of April, 1841. To this action the administrator, Isler, filed the plea of lunacy, and issue was joined thereupon; on the 8th and 13th of September, 1841, obtained a surrender of the bonds given to Yancy and the Davises, and offered to convey to Outlaw section fifteen, which he refused to receive: no conveyance of the mills was tendered. On the 17th day of January, 1842, Outlaw obtained judgment against the administrator.

Complainant filed a replication to the answer, and proof was taken.

[*Faler et als. vs. Outlaw.*]

*H. G. Smith*, for complainant. This bill is filed to compel the obligee of a voluntary penal bond for the conveyance of land, to take the land instead of damages recovered on the bond in an action at law.

The complainants are, the administrator, heir, widow and distributees of the deceased obligor.

The judgment at law was recovered against the administrator, on a breach which occurred in the lifetime of the obligor. No other plea was filed to the action, but the lunacy of the obligor at the time of executing the bond, which was found against the defendant.

The relief sought rests on the jurisdiction, first, to relieve against the penalty of a bond; second, for specific performance.

The jurisdiction is indisputable, to relieve against the legal consequences of the breach of a penal bond.

The land is the object of the bond; the penalty, merely a security for such object. Relief will universally be granted against the penalty, if the principal object of the bond can be fulfilled, unless an equity is shown in favor of the obligee against the relief. "For it is against reason, conscience, and natural equity," to use the language of Mr. Story, in 2 Eq. Ju. s. 1316, "to say that because a man has stipulated for a penalty in case of his omission to do a particular act, the real object of the parties being the performance of the act, if he omits to do the act, he shall suffer an enormous loss wholly disproportionate to the injury to the other party." "Where the penalty is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation." 2 Story's Eq. Ju. s. 1314, s. 1320, s. 1315; 1 Fon. Eq. b. 1, c. 3, s. 2, n. d; 2 Chan. Cas. 88, (cited 1 Chit. Eq. Dig. 197); 1 Call. 533, (cited 2 Am. Ch. Dig. 63.)

How stand the equities between these parties? The bond was voluntary. It is so by its terms which estop dispute: it is admitted to be so by Outlaw, when he calls it the "*bounty*" of his uncle; and when he states it was the fulfilling of the liberal designs which his uncle cherished toward him. The setting

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up his removal to this country as a valuable consideration to support the obligation of the bond, is totally destitute of proof, and is an attempt to turn the *bounty* of his benefactor into a compulsory contract, a generous gift into an oppressive trade.

It was therefore a *bounty*, and of *land*, not *money*. To allow Outlaw to avail himself of his legal advantage, to turn a *bounty* into a burden, an act of generosity into an instrument of injury, the beneficence of Gen. Bryan into a curse on his wife and child, is to encourage ingratitude. This, equity will not do. And could the benefactor have foreseen the event, far would he have been from bestowing his bounty to such purposes.

And all this claim of Outlaw is founded on his having obtained the legal advantage of his judgment at law; and this judgment at law was founded on the breach of the bond by Gen. Bryan in his lifetime; and this breach was occasioned by his being on his dying bed at the time when the strict terms of the bond required performance of the condition; and the performance of the condition was expressly waived by Outlaw; and thus was obtained the advantage at law which is to enable an ungrateful beneficiary to pervert the generosity of the friend into a curse to his wife and child. And but for the breach thus occurring, and the advantage thus obtained, Outlaw would be without pretext for asserting this claim for money, never having to the present moment registered his bond, and thereby placed himself in a condition to maintain an action at law upon it against the administrator.

Of what wrong or injury does Outlaw complain, that he shall be permitted to avail himself of the legal advantage so obtained? Nothing but the delay and refusal to execute to him the title, and the depreciation in the value of the land in the meantime.

No injurious *laches* are imputable to Gen. Bryan. He was in his last sickness when Outlaw arrived in the country: in fifteen days after Outlaw came, he died; and in the meantime, Outlaw expressly dispensed with the performance of the bond, by agreeing to take another and adjoining section to that stipulated for in the bond. Nor are any injurious *laches* justly imputable to the complainants, as Gen. Bryan's representatives since his death. No pretence is made, or if made is totally

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without proof, that the heir of Gen. Bryan has been requested or has refused to convey the land. The only testimony in the case, is the refusal of the widow of Gen. Bryan, placed on the ground of discourtesy in Outlaw, to execute a conveyance of section fourteen, the land not embraced in the bond, and Outlaw's declaration to the witness Bagley, that Isler, the administrator, had refused to convey the same section of land. To make the most of this, it is but slight evidence of an injurious negligence or refusal to comply with the terms of the bond.

As to Mrs. Bryan, the widow, she had no interest in the land to convey, and the application to her and her refusal was nugatory; and no wrong or injury can be predicated of such refusal.

As to Isler, the administrator, his refusal was justifiable on two grounds: First, he had as administrator no power to convey land not embraced in the bond of his intestate: Second, if the land Outlaw required him to convey had been embraced in the bond, the demand was premature, and Isler was not bound to execute the deed, for the reason that Outlaw had not, and has not to this day, registered his bond. See Act of 1794, c. 5, N. & C. Dig. 77.

To this may be added, that by the provisions of the Act of 1794, c. 5, the holders of title bonds cannot charge the personal estate of the deceased obligors, until they register their bonds, demand a deed, and meet a refusal, from the personal representative. For these reasons, no wrong or injury to Outlaw can be predicated of Isler's refusal to execute a deed.

As the relief against the penalty at law, sought by this bill, involves the specific acceptance of the principal object of the bond, the defendant insists against the relief, some of the rules applicable to pure cases of specific performance.

The remedy is not mutual, it is said; equity will not compel the obligor of a voluntary bond to execute the condition, and, therefore, will not compel the obligee to receive the performance of the condition. This is an application of the rule to a case without its operation. The rule is well applied to cases where the complainant is requiring the defendant to perform on his part, as to pay money or perfect a sale by paying the price or conveying the land, or in similar cases. But obviously this

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rule cannot be justly applied, where the defendant is required to perform nothing, pays nothing, but merely to receive performance on the part of the complainant, after the execution by the defendant of the terms of the gift or contract on his part. The rule is, shortly, that the one party shall not compel the other party to complete the unexecuted terms of the contract on his part, unless the latter has the like remedy against the former.

But on the footing assumed by defendant, that the bond is not voluntary, but supported by the valuable consideration of improving his condition, by removing from North Carolina, the remedies are mutual. The bond might have been enforced by the defendant against the complainants.

The legal advantage which Outlaw has in the judgment at law, is insisted on in his defence. This advantage only avails where the equities are equal. No such equality exists here. All the equity is on the side of the complainants; all the hard dealing, with the defendant.

Nor does the rule bear on this case, that the party who has neglected to avail himself of his defence at law, cannot come into equity; for the matter on which complainant asks relief, is not matter of defence at law, but exclusively of equity cognizance.

So far as the doctrines applicable to pure cases of specific performance bear on the present case, none stand in the way of the relief asked. Time is not of the essence of this contract, and was expressly waived by Outlaw. Fraud or bad faith are not justly imputable to the complainants, nor any injurious *laches*. Nor has such change of circumstances occurred, as sustain the defence of the respondent. Had the title been made, the value of the land would have equally depreciated.

*Stanton*, for defendant. After a party has waived a written contract for land by parol agreement, he cannot claim a specific performance of the original contract. *Walker vs. Wheatley*, 2 Hump. 119; Fonblanque's Eq. 283, (4th American Edition,) and authorities there quoted, to wit, *Goman vs. Salisbury*, 1 Vern. 240; *Segal vs. Miller*, Ves. 229, &c.; *Botsford vs. Burr*, 2 J. C. R. 416.

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This case is very different from those in which a party has been allowed until the decree to perfect his title. The vendor has never been permitted to speculate upon the property; to sell it and get it back, and then come into equity and claim a specific performance. It is to be observed, that all parties, Gen. Bryan in his life-time and the complainants since his death, have been involved in this parol abandonment of the contract, and the subsequent sales of the lands to Davis and Yancey.

The only equity which the complainant might possibly set up against this parol waiver of the contract, would have been a readiness and willingness on their part to convey to Outlaw section 14, that which was to have been conveyed by the parol agreement. But this they never offered to do. They do not pretend in their bill, that they were willing to do so; and Outlaw in his answer avers that they positively refused to convey either section, and that they have actually sold and conveyed section 14. The deposition of Mr. Williams, (record, page 18,) and Bagley's deposition, (page 19,) prove the refusal by complainants to convey. *The plea of lunacy*, still further shows the complainants resistance of the contract.

If a party has been dilatory and negligent, equity will refuse a specific performance, upon the *presumption* that the party has abandoned his contract.

But here there is not merely negligence and delay; there are also bad faith and resistance; not merely a bare *presumption* of an abandonment of the contract, but an *express repudiation of it*.

Under these circumstances equity will refuse its aid. 2d Story's Eq. pages 53, 81, 85-6-7-8; Fonblanque, 282, 283, (top page, Edition as above); *Smith's heirs vs. Christmas*, 7 Yerg. 565; *Benedict vs. Lynch*, 1 J. C. R. 370; *Milward vs. Earl of Thanet*, 5 Ves. 720, and note.

The complainants are not in a situation to fulfil the whole of their contract; for the evidence does not make out their title to the mill. The deposition of W. Fairson, (record, p. 16,) shows that the complainants dismantled the mill after the contract, taking out and carrying away the irons, stones, the running-gear and every thing valuable, rendering the mill worthless. This was done, no doubt, as the answer alledges, to defeat the de-



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defendants enjoyment of the contract. Equity will scarcely force a party to receive only a portion of the property contracted for, especially when the deficiency is caused by the fraud or fault of the vendor himself. 9 J. R. 450; Fonb. Eq. page 155, note (B. 1, ch. 3, sec. 9; note); 2 Story's Eq. §2.

But the defendant has fairly obtained his verdict at law, and there is no equitable circumstance which the complainants can set up against it. The court cannot presume that the jury have given more than the value of the land; the verdict was, in fact, in accordance with the proof. But if it had been otherwise, there was a remedy in the court which rendered the judgment.

Nor can the fact, that the bond was not registered, avail the defendants here; it should have been pleaded at law. And besides, as the breach occurred in the life-time of Gen. Bryan, the want of registration was no defence. The defendant never presented a deed to Isler to be executed by him as administrator, but to all the complainants as heirs of Gen. Bryan, in whom the title resided. Registration was not necessary as to them, and the administrator may waive the necessity of registration if he will.

So the defendant has obtained his advantage at law, fairly and without fraud; and equity will not specifically execute a contract under such circumstances. *Lay vs. Colsten*, 1 Hen. & Munf. 110, quoted Fonb. Eq. 49, note, (B. 1, ch. 1 sec. 5, note,) also cases quoted 2 Pirtle's Dig. pages 489, 508 and 510.

*Barry*, for defendant.

REESE, J. delivered the opinion of the court.

In 1839, the late Joseph H. Bryan, of Fayette county, then in life and on a visit to Raleigh, N. C., gave his bond to his nephew, the defendant, binding himself in the penalty of ten thousand dollars, to convey to him six hundred and forty acres of land in a body, being part of a fourteen hundred acre tract, including the improvements on section 15; and also certain mills upon a small portion of land in the neighborhood of the

[Mays vs. Jennings]

same, all lying in the State of Mississippi; on the condition that he would remove from Raleigh, N. C., to La Grange or its neighborhood. Before Bryan returned from N. Carolina complainant, acting as his agent, contracted to sell section 15, including said improvements, to some persons by the name of Davis, subject, as the bill says, to the ratification of Bryan on his return. In December, 1839, Outlaw moved out, bringing with him his family and slaves; and the section 15 being contracted as aforesaid, to be sold, he was requested by Bryan to examine section 14, adjoining, and being satisfied therewith, under the circumstances, the defendant settled thereon under a parol or verbal agreement, that it was to be conveyed to him instead of sec. 15. In December, 1839, Bryan died intestate, leaving the wife of complainant, as his only heir at law, and a widow surviving, complainants in this bill. Jesse Isler, the son-in-law, administered upon the estate of Bryan, and he, his wife and the widow executed to the Davises a bond to convey title to part of sec. 15, and to one Yancy for another part. They did not offer to convey sec. 14 to the defendant. On the contrary, the silence of the bill, the allegations of the answer, and the proof in the cause, make it apparent, that they refused to convey sec. 14 to the defendant upon his special application to that end. In this state of things, defendant, on the 14th April, 1841, brought his action at law upon the bond against complainant, as the administrator of Bryan. Complainant sought to avoid the validity of the bond by the plea of lunacy of his intestate at the time of its execution. This was the only plea. A verdict was found for the defendant in the bill. The plaintiff at law upon this issue, had his damages ascertained and assessed, and judgment thereon rendered. In September, 1841, Isler procured Yancy to release to him, (Isler,) not to the heirs, the title bond given by Isler to Yancy for four hundred acres of sec. 15, and about that time offered to defendant to make a deed for that section, which was refused. This bill is filed to enjoin the judgment at law, and compel the acceptance of a deed for the 15th section, upon the general ground, that a Court of Chancery looks at the substance of the contract, as being for land, and will not subject them to pay the money rather than the land,

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unless on the ground of wrong or fault. It would not be contended, perhaps, that if Bryan had lived, had contracted to convey lot 15 to others, had made a parol agreement with defendant for lot 14, and refused after defendant had made considerable improvement to convey lot 14, had finally been sued upon the bond at law, had pleaded *non est factum*, had resisted a recovery, and finally a recovery being had upon the bond at law, had then filed his bill for a specific execution of the contract; it would hardly be contended by any one, that a Court of Chancery, under such circumstances, would decree in his behalf the specific execution of the contract. And yet this case is identical with that. There is but one heir at law, who is actually represented by complainant, her husband, and he too is the administrator. He combines in himself all the interests real and personal of Bryan, as he would have himself have done in the case supposed. Now, legatees under a will, or distributees in case of intestacy, would often be able in a Court of Chancery to throw off from the fund claimed by them, the burthen of a judgment at law obtained for a breach of covenant to convey land, and impose it upon the heirs, by compelling a specific execution of the contract of purchase. But, here, after the death of Bryan, all the parties in interest, surviving, joined in a bond to Yancy; all joined in refusing a conveyance for lot 14; and all joined no doubt in the vigorous resistance of the suit at law. Indeed there is much reason to infer from the order and sequence of events in the case, that before Bryan's return the contract of sale with Davis was made by Isler with the express view of defeating the purposes of Bryan and the claims of Outlaw as to lot 15. And the same active exertions of the parties in interest after the death of Bryan to baffle and defeat the claim of Outlaw, seems to have been made.

These circumstances, then, combined with the further fact, that the land has greatly diminished in value, and that it lies out of the State, and beyond its jurisdiction, makes it, in our opinion, a plain case, for refusing the active interposition of a Court of Chancery to decree the acceptance of title to lot No. 15. The decree of the Chancellor will be affirmed.



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF TENNESSEE.**

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**KNOXVILLE, JULY TERM, 1843.**  
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**ALLEN vs. DODD.**

1. When a wager is lost and the property or money is paid or delivered, the plaintiff cannot recover it back, except in the cases provided for in the statute of 1799, ch. 8, and in the time therein limited.
2. Betting on elections is not embraced by the statutes on the subject of gaming, nor by that which gives to a party losing the right to recover back his property lost at gaming within ninety days.

This is an action of debt, with a count in detinue, brought by Dodd against Allen, in the Circuit Court of Green county. Defendant pleaded *nil debet*, and *non detinet*. At the June term, 1842, the case was submitted to a jury, Anderson, Judge, presiding. The jury found that the defendant did detain the horse mentioned in plaintiff's declaration, and assessed his damages at \$100. A motion was entered for a new trial, which was overruled, and judgment rendered according to the verdict. To which defendant excepted, and appealed to the Supreme Court.

The question for consideration was, whether the charge of the Circuit Judge to the jury was correct. The charge is set out in the opinion of the court.

*McKinney*, for plaintiff in error.

*Arnold*, for defendant in error.

[Allen vs. Dodd]

REESE, J. delivered the opinion of the court.

In September, 1840, shortly preceding the last Presidential election, the plaintiff in error, Samuel Allen, signed and sealed the following instrument: "For value received, I promise to pay John Dodd two hundred dollars, in specie, whenever Martin Van Buren is elected President of the United States, at this present presidential election; and if either Mr. Van Buren or Harrison dies before the election in 1840, then the said Dodd is to receive but one hundred dollars."

At the time this instrument was made, Dodd delivered to Allen a grey horse, which was worth the sum of one hundred dollars. The transaction was a bet or wager upon the result of the pending presidential contest. This suit was brought by Dodd, after the result of the election was ascertained, to recover the value of the horse, or the horse itself, it being an action of debt, with a count in detainue. By the judgment of the Circuit Court, Dodd recovered the value of the horse, and Allen has prosecuted his appeal in error to this court, for the purpose of reversing that judgment. The matter chiefly insisted on as error in the argument before us is, that the Circuit Court charged the jury, "that although the contract may have been executed, and the horse delivered before the result of the presidential election was known, and the suit in this case was not instituted until after such result was ascertained, still the condition of the defendant, to whom the horse was delivered before the result was ascertained, and who retained him afterwards before the suit was brought, was not better than that of the plaintiff, who might, under any circumstances, treat the contract as a nullity, and well maintain this action."

The plaintiff in error by his counsel, strenuously, and, as we think, successfully contends that this portion of the charge is erroneous. If a party comes into court seeking to enforce an immoral or illegal contract, it is most obvious that he must be repelled by the courts if they would not countervail the very end and object of their creation. It is different, indeed, in many cases in principle, when something having been done under such a contract, a party comes, not to enforce it, but in disre-

[Allen vs. Dodd.]

gard and disaffirmance of it, to right himself for some injury sustained or loss incurred by means of it. This he may do, or not do, according to the time and stage of the affair, the nature of the transaction and other circumstances. In wagering contracts, when the impending event is undecided, and after the event, as against a stake-holder, he may come and disaffirm the contract and recover his property; and on the ground of the nature of the transaction, he may often do so, where the matter is consummate as in transactions merely illegal, and where the parties, although both in fault, stand in a different relation to the transaction, and the policy and interest of the community are in favor of permitting the one party to set aside the transaction, without permitting which, indeed, it would have been in vain to have declared it illegal; as contracts of an usurious character: and a general principle of distinction has been attempted to be maintained, and in many cases has been recognized between cases, on the one hand, affected by illegality merely, and cases, on the other hand, where the contract was either *malum in se*, immoral, or contrary to public policy; a party in the former cases being permitted, after the contract is executed and consummated, to invoke the aid of a court of justice to set aside the contract and redress himself, and in the latter cases, being repelled from a court of justice on the ground, that being equally derelict in the transaction towards society, with the party complained of, the court will not hear his case and grant relief, not because his adversary is not to blame, or equally to blame, but because he having violated law and good morals shall not be heard to alledge that his very cause of action and claim to redress are expressly based upon the fact of such violation of law and morals. In such case the defendant is in the better, that is, in the safer attitude, he being required to say or do nothing; while his adversary has to show the case. Wagering upon elections is a transaction of this latter description. Money or property lost at gaming cannot be recovered back, except by the express provisions of the statute, and in the time therein limited. But for the statute, this could not be done, because of the operation of the general principle above discussed. But wagering upon elections is not embraced by the statutes on the

[Damron vs. Roach.]

subject of gaming, nor by that which gives to a party losing, the right to recover back his property within ninety days. This case is embraced by the general principles of many cases, a number of which have been referred to in the argument before us. But the very facts and circumstances of this case, occurred in the case of *McCullom vs. Gamby*, 8 John. 149, in which it was determined in the general, that when a bet or wager is *lost*, and the money or property has been fairly paid or delivered, the court will not help the plaintiff. "And when A delivered to B two ferkins of butter, and agreed that if P was elected Governor of the State B should pay a certain price for the butter, otherwise he was to pay nothing, and P was not elected: It was held, that A had no right of action against B for the butter."

We are, therefore, of opinion, on grounds of reason and authority, that the verdict and judgment of the court below are erroneous; that the same must be set aside and reversed, and a new trial be had, when the law will be charged conformably to this opinion.

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#### DAMRON vs. ROACH.

1. In an action of trespass the plaintiff may prove special damages if they are strictly the consequence of the trespass committed, or if the act done by the defendant causing such special damages constitutes a part of one entire transaction, of which the principal trespass was the commencement.
2. Damron pulled down the fence of Roach, whereby the cattle of Roach escaped and were lost: Held, that the loss of the cattle was strictly the consequence of the trespass and evidence thereof admissible in an action of trespass for throwing down the fence, and permitting the cattle to escape.

This action of trespass was instituted by Roach against Damron, in the Circuit Court of Knox. The declaration avers, that defendant pulled down the fence of plaintiff, trod down the grass, removed — loads of rock therefrom; and by so pulling down the fence of plaintiff, permitted ten head of cattle to escape, so that they were lost to plaintiff. Plea; not guilty, and issue.



[*Damron vs. Roach.*]

The case was submitted to a jury, and judgment rendered in favor of plaintiff, from which there was an appeal. The case was reversed. See 2 Hump. 425. It was again submitted to a jury at the August term, 1842, Scott, Judge, presiding.

The plaintiff after having proved the pulling down the fence and hauling the rock away, offered proof of the escape, loss and value of the cattle. This was objected to, the objection overruled, and the evidence submitted to the jury. The jury rendered a verdict for the plaintiff for the sum of sixty-four dollars. A motion was made for a new trial, which was overruled and judgment rendered on the verdict. The defendant appealed.

*Crozier*, for plaintiff in error.

*Swan*, for defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action of trespass brought by Roach against the plaintiff in error for throwing down the plaintiff's fence. On the trial of the cause, the plaintiff offered evidence to prove that he owned three or four cattle that were in the field when the fence was thrown down, and that they escaped in consequence thereof; and that said cattle were worth fifty dollars. The defendant objected to the reception of any evidence about the escape of the cattle and their value, but the court overruled the objection and permitted the evidence to go to the jury. The jury found for the plaintiff, and the defendant appealed to this court.

The only question now for the consideration of the court is, whether the Circuit Court erred in admitting this testimony. Formerly in actions of trespass, the evidence was limited to the proof of such facts in aggravation of damages, as occurred in the perpetration of the trespass; while injuries consequent upon the trespass, could not be enquired into. Bul. Nisiprius, 89, 10 Rep. 130, *B. Osborne's case*. But the rule now adopted is, that

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the plaintiff may prove special damages, if they are strictly the consequence of the trespass committed, or if the act done by the defendant, causing such special damages, constitutes a part of one entire transaction, of which the principal trespass was the commencement. 2 Philips Ev. 188, ch. 14, sec. 1.

In this case the escape of the cattle was strictly the consequence of the trespass committed; and although an action on the case might possibly be maintained for the value of the cattle, yet as the parties would be the same, there can be no reason for rejecting this evidence in the present action, and turning the plaintiff over to his action on the case; thus making it necessary to prosecute two actions, when the whole matter may be settled as easily by one. We think there is no error in this record, and affirm the judgment.

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#### SWAN vs. THE STATE.

1. The cases of *Mitchell vs. The State*, 5 Yerg. 340, and *Dale vs. The State*, 10 Yerg. 551, defining murder in the first degree under the penal code of 1829, approved.
2. The characteristic quality of murder in the first degree, and which distinguishes it from murder in the second degree, or any other homicide, is the existence, at the time of the death of the assailed, of a settled purpose, and a fixed deliberate design on the part of the assailant, that his assault should produce death. The length of time which the assailant deliberates on his intention, is not material.
3. Drunkenness is no excuse for or justification of crime. *Martin & Yerger*, 157, *Cornwell vs. The State*.
4. Where the nature and essence of the crime is made by law to depend on the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offence, but to show that it was not committed.
5. In an indictment for murder in the first degree, the chief ingredient in the offence consisting in a deliberate formed design to take life, evidence of drunkenness to an extent which absolutely incapacitates the defendant from forming such a deliberate and premeditated design, is admissible for the jury, to show that the offence has not been committed.

At the May term, 1842, of the Circuit Court of Monroe county, Wade Swan, the defendant below, was charged with the murder of one Lemuel G. Moore. The indictment contained but one count, which charged murder in the first degree. At the

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January term, 1843, of the Circuit Court for said county, the defendant was put upon his trial, and plead not guilty to the indictment, Scott, Judge, presiding. The jury returned a verdict of guilty; and further, that there was no mitigating circumstance in the case. The defendant moved for a new trial, which was overruled, and the court proceeded to judgment upon the verdict of the jury, which was, that defendant on the 3d day of March, 1843, between the hours of 12 and 4 o'clock, be hanged by the neck until he be dead. To all of which defendant excepted, and prayed and obtained an appeal to this court.

The facts of the case, and charge of the Circuit Judge are fully set forth in the opinion of the court.

*Jarnigan*, for plaintiff in error.

*Attorney General*, for the State.

REESE, J. delivered the opinion of the court.

The prisoner was convicted of murder in the first degree, and judgment of death pronounced against him in the Circuit Court for Monroe county. To reverse that judgment he has prosecuted his appeal in error to this court.

It appears from the bill of exceptions that it was proved at the trial, by William Dye and Milton Dye, witnesses on behalf of the prosecution, that in the month of March, 1842, the prisoner, Wade Swan, the deceased, T. G. Moore, and one Joel Blackwell, the last a penitentiary convict, were assisting the witness to roll logs. While engaged in this employment the prisoner and the deceased both became intoxicated; they were friendly during the whole day, so far as witness knew. The two witnesses at the close of the day went to the house, leaving the other three in the field. When supper was ready they were called to come and partake of it, and came; both prisoner and deceased being still intoxicated. After supper the deceased took a seat by the door, and owing to his chair-post slipping through a crack of the floor, he knocked his head against the door-check. Witness, William Dye, asked deceased if he was

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hurt, and he said, "not much." The prisoner then got a torch, and as he started out of the house tripped his foot and stumbled; the deceased said, "take care and not fall." The prisoner replied, "take care and not fall yourself," and left the house. Witness thought prisoner had gone home; but in about two minutes he returned and called to a little boy to take his torch; witness told the boy to do so, and he took it. Witness then saw the prisoner have a hand-spike drawn in both hands, holding it to one side and immediately stepping into the house he struck Moore, the deceased, two or three blows on the forehead, giving him a deep cut over the left eye, two or three inches long, and breaking the bone over the eye. Witness noticed, also, two or three red spots on the forehead of the deceased. The deceased was setting down, with his head leaning against the wall, and made no resistance to the assault of the prisoner. This took place about 8 o'clock at night; Moore died about 9 o'clock in the morning of the next day. The hand-spike was a young gum, about 4½ or 5 feet long, and very large. Witness could have killed a horse with it, and considered it a very dangerous weapon, and is sure that the deceased came to his death by the blow inflicted by the prisoner as before stated. The deceased spoke a very few words only after he was stricken by the prisoner. The deceased was an inoffensive man, and would not take his own part when imposed on. The deceased and prisoner had always been friendly so far as witness knew. Prisoner invited deceased to help him roll logs on the next day.

James Nicholson, another witness for the State, testified, that about 10 or 11 o'clock the next day he saw the prisoner passing by his field six or seven miles from the place where the murder was committed; saw him run into the woods. Witness is a constable, and called to two other persons to assist him in arresting the prisoner. They pursued and overtook him. When he had arrested him, witness told him that he had killed Moore; prisoner said he supposed he had "died damned suddenly," as he had given him "a few pretty good taps;" that the deceased deserved them, as he had treated him "damned badly" about a twenty dollar note that Joel Blackwell had at the log rolling; prisoner said that he pronounced the note to be a counterfeit,

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and that the deceased jerked or snatched the note out of his hands, saying he was "a damned fool and no judge of money." The prisoner also, when arrested, stated that he was hunting his cow. There is no additional fact of any importance stated in the bill of exceptions as proved by any witness.

The question which first presents itself upon this record is, whether the facts sufficiently establish that the homicide in this case is of that "kind of wilful, deliberate, malicious, and pre-meditated killing," which by the provisions of the 2d section of the act of 1829, ch. 23, will constitute the crime committed, to be murder in the first degree? The principles applicable to this grade of offence, have heretofore been laid down in the cases of *Mitchell vs. The State*, and *Dale vs. The State*, with a fullness and precision appropriately illustrated by the facts, the repetition of which, if practicable, would now be neither necessary nor useful. Those principles now rest on the solid ground of reason and authority, which need not be strengthened, and cannot hereafter be lightly disturbed. The characteristic quality of this offence, and that which distinguishes it from murder in the second degree, or any other homicide, is the existence of a settled purpose and fixed design, on the part of the assailant, that the act of assault should result in the death of the party assailed; that death being the end aimed at, the object sought for and wished. In the case before us, the atrocious act was unattended by the slightest trace of provocation. The unfortunate deceased, marked by a temper which neither inflicts or resists injury, was at the moment sitting silent, reclining his head against the wall, offering or meditating no wrong in word or deed, and apprehending none towards himself, when the prisoner, with brutal violence and crushing force, wielded his fearful bludgeon, deliberately sought after and obtained for that very purpose, against the life of the deceased. It is impossible, we think, to say that the settled purpose and fixed design of the prisoner, at the time of this assault, was not to take the life of the deceased. The absence of all provocation at the time, the harmless character and conduct, and the unresisting attitude of the deceased; the deliberate search for the weapon; the return with it; the quiet disposition of the torch;

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the dangerous nature of the instrument, and the fearful manner of wielding it; all these circumstances irresistibly impress the mind with the conviction, that it was the deliberate design and purpose of the prisoner to take away Moore's life; and, indeed, if these circumstances needed or could receive additional weight, it would be found in the fact, that the prisoner when arrested on the next day, did not even pretend that his purpose was not to take life, and he refers the killing, in point of motive, to a wrong, as he deemed it, received by him from the deceased some time previously, when they were at work in the field, for which he seemed to think those fearful blows were well merited. It is true the prisoner was intoxicated, but there is no direct attempt in the record to prove the degree of it. It does not appear, that on account of this intoxication the prisoner did not make an effective hand at the log rolling; he came to supper when called; partook of it; prepared his torch to leave for home; looked out for the hand-spike; offered to give up his torch; gave it up; stepped forward with the weapon; inflicted the blow; repeated it two or three times, and on the next day remembered the character and the motives of his acts. So we are unable to say, from any thing in this record, that the intoxication which existed produced a mental condition, which incapacitated the prisoner from the exercise of that deliberate and premeditated purpose which constitutes a necessary element of homicide, of the grade of which we have been speaking. It is true, also, that if it be possible to refer the killing, in point of motive, to the few and harmless remarks of the deceased on the subject of prisoner's stumbling, either as having themselves provoked, or as having revived the recollection of the provocation in the field, such as it was, the interval of deliberation and premeditation was not a very long one; it was brief; but the cases of *Mitchell and Dale* sufficiently establish that that is not material. It is sufficient if the fixed purpose and deliberate premeditation to kill existed at the time of the assault.

We are, therefore, of opinion that the facts in the record will sustain the verdict of conviction.

With regard to the charge of the court the record informs us as follows: "The court, it was admitted on all sides, charged

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the law correctly, with one exception, to wit; Counsel for defendant requested the Judge to state to the jury, that if the defendant was drunk at the time he inflicted the wound, it would reduce the crime from murder in the first degree to murder in the second degree. But the court stated to the jury, that drunkenness was no excuse or justification for any crime, and then read the act of Assembly to the jury, and left it to them to say, in the event they should find the defendant guilty of murder in the first degree, to state in their verdict, whether there was any mitigating circumstance or circumstances."

The court was asked to charge as a matter of law, that drunkenness would reduce the crime of murder in the first degree, to that of murder in the second degree. The court in reply said, that drunkenness is no excuse or justification for any crime. The legal correctness of the general statement of the court is abundantly sustained by a long and unbroken series of authority in ancient and modern times, and by none more strongly and fully than by this court in the case referred to in Martin & Yerger's Reports. Whatever ethical philosophy may make of the matter, such probably, for stern reasons of policy and necessity, will ever remain the doctrine of the criminal courts. But although drunkenness in point of law constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made, by law, to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact affecting such state and condition of the mind, is a proper subject for consideration and enquiry by the jury. The question in such case is, what is the mental *status*? Is it one of self-possession, favorable to the formation of fixed purpose, by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits. In such case it matters not that the provocation was inadequate, or the spirits voluntarily drank; the question is, did the act proceed from sudden passion, or from deliberation and premeditation? What was the mental *status* at the time of the act, and with reference to the act? To regard the fact of intoxication as

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meriting consideration in such a case, is not to hold that drunkenness will excuse crime, but to enquire whether the very crime which the law defines and punishes, has in point of fact been committed. If the mental state required by law to constitute the crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by drunkenness or such other cause, but has not, in fact, been committed. Even in England, where the crime of murder in the first degree has not been created and defined by law, it has been held in the case of *The King vs. Griedly*, (1 Russ. on Crimes,) that "though voluntary drunkenness cannot excuse from the commission of crime, yet when, as upon a charge of murder, the material question is, whether an act was premeditated, or done only with sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration." And in Pennsylvania, upon a statute similar to ours, (*Pennsylvania vs. McFall*, Adds. 257,) it has been held, that "drunkenness does not incapacitate a man from forming a premeditated design of murder, but as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design." But the bill of exceptions informs us that the charge of the court was in all respects unexceptionable, except as to the point stated. We are, therefore, to suppose that the court when charging upon the nature and character of murder in the first degree, did charge whatever was proper upon the subject we have been discussing; upon the whole then, we have felt it to be our duty to affirm the judgment in this case.



**HANNUM vs. WALLACE.**

An endorser for \$6000, took a deed of trust upon real estate to the extent of \$3000, to indemnify himself against liability. The drawer discharged \$3000: Held, that the property was not discharged from the deed, but continued liable to the extent of \$3000 as an indemnity till the whole debt was discharged.

Ejectment by Wallace against Hannum for three lots in Maryville, Blount county. Plea; not guilty, and an issue thereupon was submitted to a jury at the May term, 1843. A verdict and judgment were rendered for plaintiff; from which the defendant appealed. The facts are stated in the opinion of the court.

*Jarnigan*, for plaintiff in error.

*Hynds*, for defendant in error.

**TURLEY, J.** delivered the opinion of the court.

This is an action of ejectment brought to recover possession of three lots in the town of Maryville, Blount county, known by Nos. 55, 56, 57. The lessor of the plaintiff claims title as a purchaser at a sale made by the Marshal of East Tennessee, by virtue of an execution against James Berry, Jacob F. Fout and others, issued from the Federal Court at Knoxville, bearing test the 2d Monday of October, 1834, upon a judgment rendered the 16th of October, 1834; the deed of conveyance from the Marshal bearing date the 2d day of February, 1835. The defendant resists a recovery upon the ground, that at the date of the levy and sale by the Marshal there was no legal title to the premises in dispute vested in James Berry and Jacob F. Fout, or either of them, and of consequence that there was nothing in the premises which the Marshal could legally seize, or the lessor of the plaintiff buy. And to support this position, he read to the court and jury a deed of conveyance from James Berry and Jacob F. Fout, for the lands in controversy, to Dan'l. D. Fout, bearing date the 19th day of July, 1831, by which they were conveyed in trust to secure Thomas Henderson and Richard Merideth, as endorsers for the sum of three thousand

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dollars, which amount they were desirous of obtaining as a loan from some banking institution in Nashville. The testimony of John Sommerville, the Cashier of the branch of the U. States Bank at Nashville, shows that on the 4th of May, 1831, a note drawn by James Berry and Jacob F. Fout, for the sum of \$5181, endorsed by Richard Merideth and Daniel D. Fout, was discounted at that bank, which was renewed by a note drawn and endorsed by the same parties on the 27th of July, 1831, for the sum of \$5200, which was renewed on the 28th of September, 1831, for the sum of \$5235, by a note drawn by the same drawers, and endorsed by Daniel D. Fout and Thomas Henderson, which was renewed from time to time, adding interest, until the 4th of July, 1832, at which time it was consolidated with another note under discount for \$2225, and amounted in the aggregate to the sum of \$7592, for which amount a note drawn by said Berry & Fout, and endorsed by said Daniel D. Fout and Thomas Henderson, was then discounted. This note, with the same endorsers, was renewed from time to time till the 1st of June, 1833, at which time it had been reduced by payments, made by the drawers, to the sum of \$5400, for which it was then renewed for four months, with the same endorsers, and at maturity protested for non-payment. On the 3d of October, 1833, Jacob F. Fout paid on the note the sum of \$347 13, which reduced it to \$5050 87, for which suit was brought in the Federal Court at Knoxville, against drawers and endorsers, and judgment obtained and an execution issued and sale thereon of the premises to the lessor of the plaintiff, as herein before stated, who purchased at the price of \$1115. That the deed of trust of the 19th day of July, 1831, vested the legal title in Daniel D. Fout, the trustee, subject to the trust therein specified, and left nothing in James Berry and Jacob F. Fout, subject to the execution in favor of the United States Bank, if the deed were a valid, subsisting and unsatisfied deed at the date of the levy, and the purchaser could acquire no legal title under a sale made by virtue of a levy of an execution under such circumstances, are propositions too plain to be controverted; in fact they have not been controverted by the counsel for the plaintiff in ejectment.

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But the validity of the deed of trust has been attacked upon several grounds, but one of which is it necessary to examine and decide upon, as all the others were determined by the Circuit Judge in favor of the position assumed by the defendant in ejectment. The plaintiff, among other things, contended that under the deed of trust Henderson could not claim an indemnity beyond the sum of three thousand dollars, though his liability as endorser might amount to more, and if his liability to the amount of three thousand dollars had been discharged by the drawers, that the property conveyed in the deed was discharged from the trust, and liable to execution; and so the court charged. In this there is manifest error. The substance of this charge is this, if an endorser take surety by trust upon property to the amount of \$3000 and endorse for \$6000, and the drawer pay \$3000, the property is discharged from the trust, becomes liable to other creditors, and the endorser has lost his surety. The reverse of this proposition is the law. The property is charged to the extent of the \$3000, and is liable to that extent, no matter what amount of liability over and above that, may have been discharged from other sources. This proposition is so plain, that we do not well see how the error was committed, but it is fatal to the verdict and judgment rendered in this case, for the proof showed that more than \$3000 of liability on the part of the endorser, Thomas Henderson, which had been created after the date of the deed of trust, had been discharged by Berry & Fout; and the jury were bound by the charge of the Judge to find that the deed of trust had been satisfied before the levy and the sale under the execution, and that a legal title was acquired under the purchase by the lessor of the plaintiff. There is proof in the record tending to show, that Jacob F. Fout, the trustee, and Thomas Henderson, the *cestui que trust*, consented to the sale. What effect this may have in making the same good and valid, we will not now determine, as the case must be reversed upon the proposition discussed. Judgment reversed, and case remanded for a new trial.

**JONES vs. WILEY et als.**

Where a bond was given to the Governor and his successors in office by a Clerk which was not a statutory bond: Held, that no action lay in the name of the successor; but the bond being a good common law bond, the action should be brought in the name of the personal representative of the deceased Governor.

This action of covenant was instituted in the Circuit Court of Roane county, in the name of Jones, Governor and successor of N. Cannon, for the use of the State, against Wiley, Clerk of the County Court, and his sureties on their official bond. This bond was executed on the 25th day of April, 1836, payable to N. Cannon and his successors in office, for the collection and payment of the tax on suits and other State tax which, by law, he ought to collect or should come to his hands, and the breach assigned was the non-payment of said taxes.

The defendant pleaded, that the bond was taken by a court which had no authority to take or receive the same, and of which he was not clerk.

The plaintiff demurred to this plea, and there was a joinder in demurrer. It was argued before Scott, Judge, and he overruled the demurrer and gave judgment for the defendant, and the Attorney General appealed on behalf of the State.

*Attorney General*, for the State.

*Lyon and Jarnigan*, for the defendant.

REESE, J. delivered the opinion of the court.

A motion in the name of James K. Polk, successor of Newton Cannon, Governor, &c., was heretofore made against the said Wiley and the other defendants, his sureties, as Clerk of the County Court of Roane county, in which judgment was given on behalf of the defendants in the Circuit Court of Roane, and affirmed in this court, upon the ground, that the clerk's bond was not taken at the proper time, or by a tribunal having power to take it, having been taken by the court of Pleas and Quarter Sessions, organized and existing prior to 1836, and not by the County Court established by the law of that session.

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But in determining that case, this court intimated that an action at common law might be brought and maintained upon the bond. This action has been brought, but it has been brought, not in the name of Newton Cannon's personal representative, as would be necessary on a common law bond, but in the name of James C. Jones, Governor and successor of Newton Cannon. This is not to bring a common law action upon the bond, and this suit differs from the motion only in form.

It has been determined, that although the bond may be good, as a voluntary bond, it containing no provisions which are improper, illegal or against public policy, but quite the contrary, still not having been taken by the proper authority and pursuant to law, it is not good and effectual as an official or statutory bond. But this suit is brought in the name of the successor of the obligee or covenantee in the bond. But a successor cannot sue in a mere common law action upon a voluntary bond, which is not statutory and official. He can sue only upon an official or statutory bond. It is only by virtue of the statute that a successor can sue. By the common law, the obligee or his personal representative alone can sue. See the case of *Hibbit v. Canada et al.*, 10 Yerg. 465, and the cases there referred to. There is nothing inconsistent with this view of the matter in the case of *Polk vs. Plummer*, in 2 Humphreys' Reports. That case maintains that certain stipulations did not make the bond void as a statutory bond, but are to be treated as surplusage. The bond in that case was held to be statutory.

For these reasons we hold the declaration in this case to be bad, the action to be brought in the name of an improper plaintiff, and we, therefore, affirm the judgment of the Circuit Court.

**TIMMONS vs. GARRISON.**

1. A creditor decoyed the slave of a non-resident debtor into the State of Tennessee for the purpose of having him subjected to the satisfaction of his debt by attachment: Held, that a levy of the attachment upon the slave so decoyed into the State, did not give the court jurisdiction, and the court upon the dismissal of the attachment bill had the power to order the slave to be carried to the State line and delivered to the debtor or agent.
2. A court has the power, at any time during the term, to alter, modify or overrule its decrees or judgments.
3. The finding of a jury in an issue of fact directed in Chancery, is not entitled to as much weight as the verdict of a jury on an issue at common law, but is, nevertheless, entitled to much weight with the Chancellor, and if not set aside by him, it will be sustained, unless it satisfactorily appear to be unsupported by proof.

This bill was filed in the Chancery Court at Cleveland, Bradley county, and was tried before Chancellor Williams. He dismissed the bill. The complainant appealed. All the material facts are stated in the opinion of the court.

*Trewhitt and Gaut*, for complainant.

*Rowles*, for defendant.

**TURLEY, J.** delivered the opinion of the court.

This is an attachment bill, filed by the complainant against the defendant, a resident citizen of the State of Georgia, under the provisions of the Act of 1836, ch. 43. The attachment sued out was levied in the State of Tennessee, upon a negro man the property of the defendant, Garrison, who pleaded in abatement, that the negro had been decoyed out of the State of Georgia, his place of residence, by the complainant, for the purpose of giving the courts of Tennessee jurisdiction of the matters in controversy between himself and the complainant. The same defence is set up and relied upon in the answer.

The Chancellor directed an issue of fact, involving this question, to be tried by a jury, who found upon their oaths, "that the complainant did seduce and decoy the negro man from the possession of the defendant, in the State of Georgia, for the purpose of subjecting him to the attachment laws of Tennessee, and that he was brought to the State of Tennessee by the pro-

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curement of said Timmons, the complainant, with such intent." Upon this finding by the jury, the Chancellor dismissed the bill, and directed the sheriff to deliver over the negro to the defendant or his agent. In pursuance of this decree, the sheriff delivered the negro to the agent of the defendant, but immediately arrested him again upon another writ of attachment in the name of the complainant for the same demand, which had been prepared and procured to be issued by a Justice of the Peace, returnable to the Circuit Court.

The Chancery Court not having adjourned, but being in session, information of this fact was communicated to the Chancellor by affidavit, who thereupon so modified the decree previously given in the case, as to direct the sheriff to take the negro to the line dividing the States of Tennessee and Georgia, and there deliver him to the defendant or his agent; and thereupon the complainant prosecuted his appeal to this court. And several propositions are now presented for consideration.

1st. Is the defence set up in the plea and answer of the defendant available? We hold that it is; that the attachment laws of the State of Tennessee are made to enable our citizens who have debts due them by non-residents, to subject the property of their debtors, which may be found in the State to their demands, without being compelled to pursue their redress in a foreign tribunal; but it would be monstrous so to construe them, as to enable a rapacious creditor to give jurisdiction to our courts against non-residents, by purloining their property and bringing it into the State. No court, upon being legally informed of the existence of such fact, would entertain jurisdiction of a case based upon such illegal and indefensible conduct.

2d. Did the jury find the issue of fact according to the proof? We are bound to say they did. It is true, as has been argued for the complainant, the finding of an issue of fact in Chancery is not as obligatory upon the court as is the finding of a verdict upon an issue at common law, but still it has much weight, and will be sustained unless it appear satisfactorily to be unsupported by proof. A jury of the county have found the fact; the Chancellor, who presided over the trial, was satisfied therewith, and made it the basis of the decree. The bill of excep-

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tions does not purport to contain all the testimony given in before the jury, but on the contrary, it is nearly certain it does not. We can see no reason for setting aside the finding; indeed, without discussing the proof contained in the depositions, which are part of the record, we think there is much from which the inference may fairly be deduced, that the complainant did entice and procure the negro to come to Tennessee for the purpose of attaching him.

3d. It is contended that the Chancellor had no legal power to modify the decree as was done, and by which the sheriff was directed to take the negro to the Georgia line and deliver him to the defendant or agent.

It was at the same term of the court at which the decree had been given, that it was modified; and that during the term the judgments and decrees of the court are in the breast of the Judge and may be changed, modified or overruled, has been so often held, that it would be a waste of time to expatiate upon the question. It, also, may be observed, that the levy of the second attachment was as illegal as the first, and the same defence would have been good against it. The bringing the property to the State of Tennessee was a wrong done by the complainant, and out of which he could be permitted to acquire no legal rights. The negro was not subject to attachment at his suit, until he had been restored to the possession of his owner, in the State from which he had been surreptitiously procured.



*KINCAID et al. vs. SMITH.*

1. In an action of assumpsit the defendant pleaded non-assumpsit, statute of limitations and set-off. "The cause" was referred "to the award and arbitrament" of three persons, whose award was to be "the judgment of the court." The arbitrators awarded, that "defendant recover of the plaintiff the sum of \$150," and judgment was entered up accordingly: Held, that this judgment was erroneous. The defendant demanded nothing in the suit, and the arbitrators were clothed with authority to determine, not all the matters in dispute between the parties, but the matter in controversy involved in the suit.
2. Where the matters involved in a suit were submitted to arbitration, with an agreement of record, that the award should be the judgment of the court, and the arbitrators awarded \$150 to the defendant, and this was made the judgment of the court: Held, that the court had no power to enter up judgment for that sum: it had power to enter up judgment for the defendant, as the award determined that defendant owed plaintiff nothing.

This action was instituted in the Circuit Court of Campbell county, and the case was submitted to arbitrators, whose award was entered up as the judgment of the court. There was no bill of exceptions. The plaintiffs appealed in error.

*J. A. McKinney*, for plaintiffs.

*Netherland*, for defendant.

REESE, J. delivered the opinion of the court.

The plaintiffs brought an action of assumpsit to recover the sum of five hundred dollars against the defendant, in which action they counted upon goods, wares and merchandize sold and delivered to defendant by testator; money paid, laid out and expended by the testator for the use of defendant; and money had and received by the defendant for the use of the testator. The defendant pleaded non-assumpsit, the statute of limitations, and a set-off of debts due by plaintiff's testator to him at the time of his death, of five hundred dollars, for goods wares and merchandize sold and delivered, for work and labor done; for money loaned; for money paid and laid out, and expended, and for money had and received exceeding the claim of plaintiff, out of which he offered to set-off so much as would satisfy the demand of the plaintiffs. Issue was taken upon all these pleas; subsequently the following entry appears of re-

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cord: "William Kincaid and Sarah McNew, executors, &c. vs. James Smith. By consent of parties, this cause is referred to the final award and arbitrament of Jacob Petre, Isaac C. Petre and Robert Lindsay, whose award is to be the judgment of this court; said arbitrators to make their report at the next term of this court." The arbitrators made and reported their award as follows: "William Kincaid and Sarah McNew, executor and executrix, vs. James Smith. Whereas, by an order of the Circuit Court of Campbell county, at its May term, 1841, a certain case therein pending between William Kincaid, executor, and Sarah McNew, executrix, of the estate of Wm. McNew, deceased, and James Smith was referred to us to be arbitrated and decided, and in compliance with said order, and at the request of the said parties, we have met at the house of Robert Lindsay on the 27th day of August, 1841, to perform the duties assigned us, and the matter was continued from day to day to enable the parties to make further proof, and after hearing the allegations and proof of the parties, both being present, and fully considering, and from the best understanding of the proof, papers and matters before us, that we can get, we do decide and award, that James Smith recover of the said William Kincaid, executor, and Sarah McNew, executrix, of the estate of Wm. McNew, deceased, one hundred and fifty dollars and all the costs accruing, except the payment to the arbitrators for their services, which shall be equally divided between the parties;" and thereupon the Circuit Court gave judgment, that certain exceptions filed by the plaintiffs be overruled; that the award be in all things confirmed, and that the defendant recover of the plaintiffs the said sum of one hundred and fifty dollars, to be levied, &c., and the costs in this behalf expended. From this judgment the plaintiffs have appealed in error to this court. This award, as is seen above, resulted from a rule of reference made in a cause pending in court. The question involved in that suit was, how much the plaintiffs were entitled to recover, or whether any thing? On the one hand, the plaintiffs affirmed, that they were entitled to recover damages from the defendant, for the non-performance of promises made to their testator; on the other hand, the defendant

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alleges that the plaintiffs were not entitled to recover any thing against him, because he had not promised at all; had not promised within three years, or, if he had, that testator was indebted to him, and of that debt he was willing to set-off so much as would satisfy the damages claimed by the plaintiffs: upon the whole, on these several grounds, that the plaintiffs were not entitled to recover any thing whatever against him. He, himself, was not in *form* or in *substance* the *demandant* of any thing. His legal attitude was strictly defensive. And by no possibility could the court and jury have done more for him than to have repelled the claim of the plaintiff. Such was the suit referred to the arbitrators; such the rights and relations of the parties in that suit. With what power were the arbitrators clothed, we do not say, by the submission of the parties, or by their conduct before them, but by the rule of the court? They were clothed with power to determine, not upon all matters of controversy between the parties, but upon the matter of controversy involved in the suit. It was their award as to *that*, which, by the rule of the court, was to become the judgment of the court. This was the extent and limit of their commission from the court. The parties, themselves, may have given them a broader commission, and fuller powers, by their submission, embracing claims and rights not involved in, or legally capable of being determined by the decision of the pending suit. If so, their award might be very proper, and altogether valid as to such other claims and rights, but could not as to them, become the judgment of the court, because not by the court referred to the arbitrators, and because not involved in that with which alone the court had to do, the matter of controversy in the pending suit. This seems to us clear upon principle, and no authority to controvert it has been produced. The judgment, therefore, for the one hundred and fifty dollars, in favor of the defendant, was erroneous, and must be reversed.

But what should have been the judgment of the court? The award, that defendant should recover \$150 and the costs, determines the whole matter in controversy and more; and is, at least, in substance and legal effect, equivalent to saying, we find the plaintiffs are not entitled to recover any thing whatever

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from the defendant, but the defendant is entitled to recover his costs from the plaintiffs, which would justify the judgment that the plaintiffs take nothing by their suit, and that the defendant go hence without day, and recover his costs. This judgment we accordingly give.

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IVEY vs. HODGES, adm'r.

1. The 9th section of the 6th article of the constitution provides, that judges "shall not charge the jury with respect to matters of fact, but may state the testimony." Held, that this clause vests in the judges a legal discretion to state the testimony or not, as the circumstances may require. The mere refusal to state the facts sworn to by the different witnesses, is not *ipso facto* error.
2. Where the testimony is conflicting and difficult of recollection and comprehension, and a controversy arises as to the statements of the witnesses, it is the duty of the court to recall the witnesses or state their testimony; and a refusal to do so, where injury did or might be necessarily supposed to arise from the non-exercise of the power, it is error, for which the judgment should be reversed.
3. The judge has no right to declare what is proved, but simply to state what is sworn to. The truth of the statements of witnesses, and the deductions to be drawn therefrom, must be left to the jury.

Assumpsit by Hodges against Ivey, in the Circuit Court of Grainger. Plea, non-assumpsit. An issue on this plea was submitted to a jury at the August term, 1842, Luckey, Judge, presiding. Judgment was rendered in favor of the plaintiff for the sum of one hundred and twelve dollars, from which the defendant appealed. All the material facts are stated in the opinion of the court.

*J. A. McKinney*, for plaintiff in error.

*J. Cocke*, for defendant in error.

TURLEY, J. delivered the opinion of the court.

This case, in most of its features, is identical with that of *Noe vs. Hodges, adm'r.* determined at the last term of this court; and it is therefore governed by the principles therein laid down.\*

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\*See 3 Humphreys, 162.

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The charge of the court upon all the points arising, is in conformity with that decision; the verdict is supported by the proof, and the judgment correctly given.

But it is said that there is error in this, that the Circuit Judge was requested to state the evidence to the jury and declined doing so, for which the judgment should be reversed.

The bill of exceptions does not show that there was any controversy as to what the proof was, or any necessity for a recapitulation of it by the court to the jury; but just says, in so many words, "Defendant's counsel requested the court to state the evidence to the jury, which the court refused to do." There is nothing from which it can be inferred, that any injury was sustained on the part of the defendant by this refusal; and the abstract question for our determination is, whether a refusal of the court to state the testimony upon request, is in all cases *ipso facto* error, for which a cause must be reversed.

The 9th section of the 6th article of our constitution provides, that "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." This provision arose out of the jealousy with which our ancestors always looked upon any attempt on the part of the courts to interfere with the peculiar province of the jury, the right to determine what facts are proved in a cause, and to put a stop to the practice of summing up, as it was and is yet practiced in the courts of Great Britain and in all probability in the colonies before the revolution; and which consists in telling the jury not what was deposed to, but what was proved. This the framers of our constitution considered a dangerous infraction of the trial by jury, and have prohibited it by express terms. "Judges shall not charge with respect to matters of fact," that is, shall not state to the jury what facts are proved; to do so is error, for which a case must always be reversed. But not being disposed to withhold from the jury any proper aid which the judges may be enabled to render them in their investigation, they have provided that they may state the testimony; that is, may, for the purpose of refreshing the memory of the jury, inform them what facts the different witnesses have deposed to, leaving them to judge of the truth thereof, and to draw their deductions

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therefrom. It will be observed, that the prohibition is direct and positive, "shall not," the power permissive "may state." The use of the words shall and may in this juxtaposition cannot be supposed to have been accidental: if the intention had been to make an exercise of the power granted as positive as the prohibition, the word "shall" would have been used in both instances, viz. "shall not charge with respect to matters of fact, but *shall* state the testimony and declare the law." The use of the word "may," then, cannot in this clause be considered as synonymous with the word "shall," but leaves it discretionary with the court to state the testimony or not, according to the exigency of the case. If the testimony be of a complicated character, difficult of recollection and comprehension, and there be a controversy between the parties litigant as to what facts are deposed to, it would be the duty of the court either to state the testimony or recall the witness upon the controverted points for explanation; but when there is no dispute relative to the facts deposed to, and the testimony is not complicated or difficult of recollection, the court in its discretion may decline exercising the power given it, without committing error. This is a legal discretion, and the refusal to exercise it is not error, unless it can be shown that injury did or might necessarily be supposed to have arisen from this refusal. But it is argued, that the word "may" is applicable to both the powers given to the judges by this clause of the constitution, viz. "may state the testimony" and "may declare the law;" and it is assumed that a refusal to charge the law is *ipso facto* error, and therefore a refusal to state the testimony is also *ipso facto* error. We do not think the premises upon which this argument rests are correct, that a refusal to charge the law is of necessity, in all cases, cause for a reversal; for if there be no disputed principle of law, the court need not charge upon the law. So as to the testimony; if there is no dispute as to what is deposed to, the court need not state the proof, and this because no injury can arise from not exercising the power. The judgment of the Circuit Court is therefore affirmed.

THE STATE *vs.* NASHVILLE UNIVERSITY *et als.*

1. The legislature have the constitutional power to exclude corporations from becoming purchasers of the public domain.
2. The Nashville University by its charter is empowered "to have, receive and enjoy lands, tenements, &c. The act entitled "An act to dispose of the lands in the Ocoee District," (1837-8, ch. 2, sec. 2,) after the expiration of a given time during which occupants had a preference right of entry, subjected the land to entry by "any person or persons wishing to make the same. The Nashville University entered lands in the Ocoee District. Held, that the word "person" embraced corporations; and the Nashville University, having the power to "have, receive and enjoy lands," had the right to enter lands in the Ocoee District.
3. The Nashville University having the right to enter lands as natural persons, and also having the right to the proceeds of the sale of two half townships, the entry taker permitted the University to enter the said land without the payment of the money required by law from other enterers, the University giving its receipt to the State for so much money, as the proceeds of the sale of said land: Held, that the entries and grants thereupon were legal and valid against the State.

The General Assembly of the State, on the 4th day of February, 1842, adopted the following resolution, to wit:

*"Resolved by the General Assembly of the State of Tennessee, That the Attorney General of this State is hereby directed to file a bill in chancery against the East Tennessee College, Nashville University, and against the Hon. Luke Lea, calling on said College and University to appear and answer why the grant of the State to them of certain lands in the Ocoee District, should not be avoided, set aside, and cancelled; and calling on the Hon. Luke Lea to appear and answer why all title acquired by him in said lands, in virtue of a purchase made from said institutions, should not be divested out of him, and his deed to the same cancelled; or said Attorney may, for the purpose above, sue out process of *scire facias*, or any other process necessary in law or equity, for the purposes above stated."*

In conformity to this resolution, the Attorney General for the State filed the following bill against the Nashville University and East Tennessee College, in the Chancery Court at Cleveland, in the county of Bradley:

*"The Attorney General of the State of Tennessee, on behalf of the State, informs the Chancellor sitting in equity at Cleveland, that there is a corporation in existence, chartered by the legislature of the State of Tennessee, for the promotion of learning, called the Nashville University, located at Nashville, of*

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which P. Lindsley is president, A. V. S. Lindsley is secretary, and the following gentlemen are trustees," &c. &c.

"The Attorney General further informs the Court, that there is in existence, a corporation chartered by the legislature of this State, for the promotion of learning, called the East Tennessee College, located at Knoxville, of which Joseph Estabrook is the president, D. A. Deaderick is secretary, and the following gentlemen are trustees, to wit," &c.

"The Attorney General further informs the Court, that on the third day of August, 1839, the trustees of the Nashville University and the College of East Tennessee made joint entries of 12320 acres of land lying in the Ocoee District, in the county of Bradley, a portion thereof lying in the first township, first range west of the basis line of said district, another portion in the second township, and range one west of the basis line in said district, and one quarter section in the third township and first range west of the basis line in said district, and for a more exact description of the land entered he refers to exhibit A.

"He further informs the Court, that Luke Lea was the entry taker for the Ocoee District at the time the entries aforesaid were made, and that locations for said land were tendered to said Lea by said corporations and by them secured on the 3d day of August, 1839, when said lands were subject to entry by natural persons at \$5 per acre and no less; and that by combination and confederacy between themselves and said Lea, the locations for said land were tendered and received and laid down on the general plan of the Ocoee District, without the payment of \$5 per acre, as required by law, or any part thereof.

"The Attorney General charges that the possession and ownership of such a body of wild uncultivated land was wholly unnecessary for the purposes for which said corporations were created, and that said corporations had no power to enter such land, and the entry taker had no power to issue certificates of entry therefor, with or without the payment of the money required to be paid by the law regulating the sales of land in the Ocoee District.

"The Attorney General further charges, that the legislature of the State, by an act passed on the 20th day of January, 1838,



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authorized the entry taker, before the first Monday in November, 1838, to designate upon the plan of said district, the two half townships of land which had been reserved by law for the use of colleges and academies, and that in the designation the entry taker should be guided by the locations of the corporations aforesaid; that the entry taker (Lea) guided by the trustees aforesaid designated two half townships of which the 12320 acres was a part. This act further provides, that these two half townships should be disposed of as the other lands in the Ocoee District are directed to be disposed of, and that the proceeds arising therefrom should be paid over in equal portions to the trustees of East Tennessee College and Nashville University, provided said trustees would agree to receive such proceeds in full satisfaction of all claims which they had against the State or the citizens residing south of the French Broad and Holston rivers.

"The Attorney General charges, that the trustees of said corporations did agree to receive the proceeds of the sales of said two half townships in full discharge of the above which they held as aforesaid; that a part of said half townships were sold out under the general law at \$7 50 per acre and the proceeds of such sale received by the trustees under the said act, and in acceptance of the terms thereof; and so the Attorney General declares that the corporations were estopped, and barred from the entry of the balance of said lands, if they had the power previously to do so.

"The Attorney General further charges, that the trustees have obtained grants from the State for the land so entered, and that on the 16th day of April, 1840, sold and conveyed the same to the aforesaid Luke Lea for the price of seventy-five cents per acre.

"The Attorney General charges, that said entries were illegally and wrongfully made, recorded and laid down on the general plan of said district, and that grants of the State for the said land have wrongfully and illegally issued.

"The Attorney General prays that the corporations and Lea be made defendants, and that the grants be vacated and de-

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clared void, and such other relief as the premises now or hereafter disclosed may authorize, be granted."

The defendants demurred to the bill, and the demurrer was argued before Chancellor Williams, at the September term, 1842. He sustained it, and dismissed the bill. The Attorney General, on behalf of the State, appealed.

*Attorney General and Rowles*, for the State.

*Jarnigan*, for the defendants.

GREEN, J. delivered the opinion of the court.

This bill was filed by the State to repeal certain grants which have been issued to the Universities for lands in the Ocoee District, which lands were entered by the defendants under the law opening the entry taker's office in that District.

The act of 1837-8, ch. 2, sec. 5, provided, that the entry taker's office should be opened on the first Monday of November, 1838, for the reception of entries by "all and every person or persons, except natives of the Cherokee nation of Indians, who was or were in the actual possession of and residing upon any piece of vacant and unappropriated land in said district, at the time of the passage of" said "act, or his or their rightful assignee or assignees," should, "for the space of three months after the opening of said office, be entitled to a preference or priority of entry, for one hundred and sixty acres of land, so as to include his, her or their improvement and dwellinghouse," &c. for which they should pay seven dollars and fifty cents per acre. After the expiration of the aforesaid term of three months, all the vacant lands were to be subject, for the space of two months, "to the entry of *all and every person or persons* wishing to make the same," at the same rate of seven dollars and fifty cents per acre. After the expiration of the said two months, occupants were to be again entitled to a preference of entry for another term of two months, at five dollars per acre. And after the expiration of said last term of two months, all the unappropriated land was

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to be subject for the space of two months to the entry of "all persons who" might "choose to enter the same," at the said price of five dollars per acre. After the expiration of said two months, the price was to be graduated in the same way every two months, first in favor of occupants, and then subject to the appropriation of the general enterer; reducing the price, first to two dollars, then to one, then to fifty cents, then to twenty-five cents, then to twelve and one half cents, and lastly to one cent per acre.

The act of 1837-8, ch. 196, sec. 1, directed the entry taker of the Ocoee District, before the time of opening the office should arrive, to select and designate upon the plan of the district, the two half townships of land, which had been reserved by law for the use of colleges and academies; and declared that the money arising upon the entry of said land should be paid over to the trustees of East Tennessee College and Nashville University, in equal proportions, upon their agreeing to receive the same in full satisfaction of all claims which they had against the State, or the citizens south of French Broad and Holston rivers.

The bill alledges, that the trustees of the Colleges did agree to receive the proceeds of the said lands in lieu of the claim they had upon the people south of French Broad and Holston; and that certificates of release had been filed as the acts of 1829 and 1836 provide. It alledges that two half townships were designated for the colleges by the entry taker; and that when the office opened, a part of the land contained in them was sold at seven dollars and fifty cents per acre, and the proceeds of such sales were paid over to the trustees of the colleges; and that when the time arrived that said lands were subject to be appropriated by general enterers at five dollars per acre, the trustees of East Tennessee College and Nashville University tendered locations of all the remainder of the said two half townships of land, amounting to twelve thousand three hundred and twenty acres, at the said price of five dollars per acre, and that the entry taker received the same, although no money was actually paid, as the law required. Grants have issued to the corporations aforesaid, for all the said lands, and the colleges

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have sold the same to Luke Lea, the entry taker, for the price of seventy-five cents per acre. The bill insists that the entries aforesaid were illegally made, and that the grants illegally issued; and prays that the same may be declared null and void, and that the conveyance of the colleges to Luke Lea be declared void.

To this bill there is a demurrer. The questions now raised and debated by the Attorney General, are, first, whether by the terms of the law opening the land office for the reception of entries, corporations are not excluded; and, second, whether the nonpayment of the price of the land in cash, at the time the entries were made, does not make void the entries, and the grants issued thereon. Both of these questions are necessarily involved and decided by this court, in the case of *Everette vs. Lea*. In that case, Lea brought an action of ejectment against Everette, who was in possession of a quarter section of the land entered by the colleges and sold to Lea: Everette was in possession of the said land at the passage of the act to dispose of the lands in the Ocoee District, passed the 29th of November, 1837, and was consequently entitled to a preference of entry according to the terms of that act; but he had not entered the land at seven dollars and fifty cents per acre, nor had he attempted to enter it at five dollars per acre, until after the time, within which occupants had the preference, expired. All the facts which are set forth in this bill were stated in the agreed case of *Everette vs. Lea*, and consequently the questions now before the court were determined in that case. In that case this court said, in the opinion delivered by Turley, Judge: "Now the question for the consideration of the court, is, are the grants issued by the State of Tennessee to the Nashville University and East Tennessee College void, so as to pass no title under which the lessor of the plaintiff can maintain this action? The solution of this question depends upon the construction of the statutes by which these universities were incorporated, as to the power granted them of acquiring and holding real estate.

"By the act of 1806, ch. 7, sec. 2, the Nashville University is empowered to have, receive and enjoy lands, tenements and hereditaments, of every kind or value, in fee, or for life, or years.

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“By the act of 1807, ch. 64, sec. 1, the East Tennessee College is empowered to purchase, receive, and hold to them and their successors, forever, or for any life estate, any lands or tenements, which shall be given, granted, or devised to or purchased by it. Under the provisions of these two statutes, no one can doubt that full and ample authority is conferred upon these universities to acquire and hold, in their corporate capacity, real estate, by gift or purchase, in as ample a manner as individuals might or could under the law. This proposition is so self-evident, that argument or illustration cannot make it plainer. If these universities might acquire and hold lands from private individuals, by gift, devise or purchase, is there legal ground for saying that they may not from a State? None whatever that we can see.

“By the act of 1837, ch. 2, the State of Tennessee offered the lands in the Ocoee District for sale, under the rules and restrictions therein contained. Under its provisions, the lands in controversy were entered by the Nashville University and East Tennessee College, and grants have been issued to them. But it is said, that they had no right to enter these particular lands, because they are a portion of the two half townships directed to be set apart in the Ocoee District, by act of 1838, ch. 196, for the Nashville University and East Tennessee College, the proceeds of which were to be equally divided between them, the lands being to be disposed of under the provisions of the statute regulating the disposition of the lands in the Ocoee District. That is, that inasmuch as the proceeds are directed to be divided, no right to enter these lands could exist in the universities, because the two rights are inconsistent. The result of this argument is, that the universities are prevented from entering these particular lands by an implied prohibition. It is contended on the part of the universities, that the legislature had no power to prohibit them from entering these or any other lands in the State subject to entry, because it would be a violation of their corporate privilege. We are not prepared to go this length, for though we concede that the legislature has no constitutional power to infringe upon the rights granted by the charters of incorporation, one of which is to acquire and hold lands and ten-

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ements by gift or purchase, yet we do not see but that the State in offering its public domain for sale, may, by express provision, exclude corporations from becoming purchasers thereof, if in their opinion the public good requires it, as they may an individual, who is already the owner of land or lands, or joint stock companies. The legislature being the guardian of the republic have this power, to prevent a monopoly of the public lands and a perpetuity of title. But the question here is, has the legislature created this prohibition as to the universities? We think not. That it is not express is self-evident. And the direction, that the proceeds of the sales of the lands, specified in the act of 1838, shall be divided between them, does not, as we conceive, by any possible rule of construction, amount to such prohibition by implication. It is true, that inasmuch as these lands were to be disposed of by the provisions of the act establishing the Ocoee District, the universities had no direct interest in the soil; and, therefore, an occupant was entitled to a preference of entry, and an elder entry by an individual would be good against a younger entry by the universities; but there is no controversy with occupants, who have a right as such to contest the entries, or elder enterers at the time these entries were made by the universities. The land was then vacant and unappropriated, and there were no occupant preferences to conflict therewith. The objection, that the money price was not paid by the universities at the time of the entry, amounts to nothing, because, first, the money belonged to them; and if they had paid it, they would have been entitled to demand it again immediately from the entry taker: and, second, because if the purchase money be not paid, it does not make the entry and grant void *ab initio*, and is a thing which cannot be inquired into in a controversy between the grantee and a third person. It is, at most, a neglect of duty on the part of the officer of government, for which he is personally responsible; and so far as the grantee is concerned, can only amount to a cause for a repeal of the grant on the part of the State by *scire facias*, or in any other judicial manner that may be prescribed by the legislature."

These positions have been combatted by the Attorney Gen-

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eral to some extent; and we have listened patiently, and weighed deliberately the arguments that have been urged, anxious to correct any error into which we may have fallen. But after the most mature reflection we are confirmed in the views already expressed by this court.

It is not now controverted, but that these corporations are empowered to purchase and hold lands without limit, by their charters; and having power to purchase from individuals, it is not questioned but that they may purchase and hold lands from the State. But it is said, the State had a right to refuse to sell to them, and that in this instance the office was opened only to natural persons, by the act of 29th November, 1837. It is conceded, in the opinion in the case of *Lea's lessee vs. Everett*, that the State would have had a right to exclude any class of purchasers the legislature might have chosen to designate, so that the exception should have the character of a general law, and, consequently, corporations might have been excluded from the privilege of making entries. But the question is, does the act of assembly contain any such exclusion? It is not pretended it does in express terms, but it is insisted the word person used in the act, was intended to apply to natural persons alone, and that corporate bodies are excluded by implication. Angell & Ames on Corporations, p. 3, adopt the language of Mr. Kyd and define a corporation to be a political person, capable, like a natural person, of enjoying a variety of franchises. Kyd on Corporations, p. 15. The language of the act opening the office for entries in this case is: "and after the expiration of the said term of two months all the land lying in said district remaining unappropriated shall, for the space of two months, be subject to general appropriation *by all persons* who may choose to enter the same." The word *persons* could not have been used in a larger sense, by any phraseology with which it could have been connected. If, therefore, there is nothing in any other part of the act by which the *intention* is manifest to exclude corporations, they are certainly included in the word *persons* as used. But it is not insisted that the argument, that corporations are excluded, gains any strength from a reference to other parts of the act: it assumed, however, that although corporations are po-

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litical persons, and are included in all legal enactments where duties and disabilities are imposed upon persons, yet they should be excluded from the meaning of the word where a benefit is to be obtained. No authority, however, has been produced, where such distinction has been made in the sense of the word.

The words "*inhabitant*," "*person*," or "*occupier of land*," all include corporations, where a tax is levied, a highway to be constructed, a bridge to be built, &c. Angell & Ames on Corporations, p. 257, et seq. The Supreme Court of New-York decided, that under the act for the assessment and collection of taxes, corporations are liable to be taxed for the property owned by them; though the act speaks only of *persons* liable to be assessed, and corporations are not named. 15 John. Rep. 782. Our act of 1794, ch. 1, that authorizes any *person* or *persons*, being a creditor, to take out an attachment against an absconding debtor, was held by this court, in the case of the *Bank of Alabama vs. Berry*, 2 Hum. R. 443, to apply to corporations that are creditors, and so we understand the attachment laws to have been constantly construed. There is no ground, therefore, in reason, or authority, for the distinction the Attorney General seeks to establish, between the meaning of the word *person*, as applied to corporations, and where disabilities and duties are imposed on the one hand, and where benefits are conferred on the other; and unless the distinction can be found in the context, and which is not pretended in this case, it does not exist at all. But it is earnestly insisted, that the payment of the money to the entry taker was a condition precedent to the entry, and as no cash was actually counted, and placed in the hands of the entry taker, the entry and grant are illegal and void. In addition to what is said in *Lea's lessee vs. Everette*, it may be remarked, that as by the law the universities were entitled to the proceeds of these lands, and would have had a right to demand the money the moment it was received by the entry taker, it would have been a very useless thing to have gone through the ceremony of this double payment. If a natural person had been so situated towards the State, and had made entries as these defendants have done, it would hardly have been conceived by any one, that the failure to go through the ceremony of paying



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the money to the entry taker, that it might be immediately paid back to the enterer, would have been necessary. The State is debtor to an individual, and in discharge of that debt enacts a law, that the entry taker shall lay off a section of land for his benefit, and whenever it shall be entered, shall pay him the proceeds: occupants fail to enter the land during the period for which they have a preference; and so soon as it is subject to the general enterer, the person thus entitled to the proceeds comes and enters the land, and gives his receipt to the entry taker for the proceeds. Here all that the law required should be done, was in substance performed; but the money required to be paid was not in fact counted and delivered to the entry taker. It would doubtlessly be thought exceedingly absurd, in such a case, to hold that the grant which afterwards issued was illegal and void. And yet the case supposed is in substance the case now before the court. Or, take the case of an entry made by any person whatever; of a quarter of a section, and the omission to pay the money to the entry taker until after the entry was made, but the money is subsequently paid, and the grant issues, would any one, for a moment, suppose that the State could annul and make void the grant, as having illegally issued? Surely not. And yet, such case would be exposed to the full force of the argument which is urged in this case: for the argument is, that the money must be paid as a condition precedent to making the entry, and if it be not done, the entry is illegal, the grant is illegal, and the whole proceedings should be annulled and declared void. But more especially do we regard the ceremony of payment and re-payment as immaterial, when the rights of the parties are litigated in a court of chancery. Equity looks at the substance, and not at the form of things. The substance of the thing is, that the party entitled should receive the proceeds of the sale of the land on the one part, and that those who were entitled to acquire lands by entry should be clothed with the legal title thereto. This has been done. Had other persons made the entries, the State would have been precisely in the same situation it now occupies on the one hand; and the colleges having received the proceeds, would have stood as they now do on the other. Upon what ground, then,

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is a court of equity called upon to annul what has been done, and to place the parties *in statu quo*? So far as the parties to this suit are concerned, things have resulted, and are, in substance, precisely as they would have been, had the transaction assumed the form for which the Attorney General contends.

But it is argued by the gentleman associated with the Attorney General in this cause, that the colleges, having elected to take the proceeds of these lands according to the offer on the part of the State, contained in the act of the 26th of January, 1838, they were bound by this election, and could not, afterwards, claim the lands in specie, by virtue of the acts of 1829 and 1836. The correctness of this proposition is not controverted by the counsel for the defendants. But it does not affect the questions upon which the case depends.

The colleges do not seek to abandon their election, and to claim the lands in specie, by virtue of the previous act of assembly upon the subject. On the contrary, they come into the market as other general enterers, and claim the right as "*persons*," to enter and obtain grants for land, as natural persons might do. Had they entered lands, to the proceeds of which they were not entitled, they would have been compelled to pay for it, as other enterers were required to do. But having entered the lands that were laid off for their benefit, and to the proceeds of which they were entitled, they insist that the formal payment of the money to the entry taker, and the receipt of it back immediately, was not essential to the validity of their entries and grants; and that they are entitled to the lands, not claiming them in specie, by virtue of any former acts of assembly, but holding them as general enterers under the law to dispose of the lands in the Ocoee District.

We think there is no just objections to the validity of their title, and affirm the decree of the Chancery Court.

## SMITH vs. STORY.

1. An action on the case lies against the plaintiff in an attachment bill for the wrongful suing out of such attachment, and the defendant in the attachment bill is not bound to sue in the first instance on the attachment bond.
2. The mere failure to succeed in the prosecution of an attachment bill does not *per se*, put the plaintiff in the wrong, and subject him to a suit for damages for wrongfully suing out such attachment. For the grounds and principles upon which damages may be recovered, resort must be had to the common law action for malicious prosecutions.

This is an action in the case instituted by Story against Smith, in the Circuit Court of Cocke county. The plaintiff in his declaration averred, that the defendant wrongfully and oppressively sued out an attachment in equity against the estate of the plaintiff, charging that he was a non-resident, and the said attachment was levied on the estate of plaintiff; the estate taken out of his possession, whereby he is damaged; that said attachment bill was dismissed in the Supreme Court at Knoxville for want of jurisdiction, because it appeared that plaintiff was a resident of the State of Tennessee, and that plaintiff was harassed and put to great expense, cost and trouble in defending the attachment so wrongfully sued out and prosecuted, &c.

The defendant pleaded not guilty, and an issue joined thereupon was submitted to a jury, Anderson, Judge, presiding, at the March term, 1843.

It appeared that Story was absent about two years from the State; that he had purchased lands in Georgia, and had avowed his intention to remove, but had not changed his domicil; that Smith had, by making oath that Story was indebted to him and a non-resident, obtained an attachment against his estate, which was levied on it and a slave taken out of his possession; that a bond with sureties was given to pay all costs in case of failure, and all such damages as may be awarded against him for the wrongfully suing out said attachment, &c.; that this attachment bill was finally dismissed in the Supreme Court, on the ground of want of jurisdiction, the said Story being a resident of Tennessee.

For the defendant in this case it was contended in argument, that the plaintiff's action was misconceived, and that his reme-

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dy, if any, was upon the bond taken upon the filing of said bill and the issuance of said attachment.

It was further insisted for the defendant, that if the present action could be maintained, that then it was incumbent on the plaintiff to make out, as required in an action at common law for malicious prosecution, that the proceedings on said bill and attachment were false and unfounded; that they were instituted without reasonable or probable cause; that there was malice on the part of the complainant in instituting the same, and that the injuries, or wrongful acts on the part of defendant, alleged in plaintiff's declaration, were not of a character to entitle the plaintiff to recover any damages in this action. And that in other respects of the case the law was for the defendant; and his Honor was requested so to instruct the jury. But he refused to do so, and charged the jury, that it was indispensably incumbent on the plaintiff before entitling himself to any right of action on the attachment bond above referred to, to bring first an *action on the case* for the wrongful suing out of the attachment in order to ascertain his damages, and until this was done he could maintain no action on said bond. And, therefore, this suit was well brought, and was the appropriate form of action in said case. His Honor further charged the jury, that the principles above contended for by defendant's counsel in reference to the falsehood of the matter in the former suit, want of probable cause, malice and the nature of the damage or injury sustained, applied only to common law actions, but not to this action; that this was a new action or remedy, prescribed by our own attachment laws, to which these common law principles did not apply; that the legislature intended to make the simple fact of the wrongful suing out of the attachment, under any circumstances actionable. And if the defendant in said attachment, had not in point of law and fact changed his domicile at the time of the issuance of said attachment, that then, in the opinion of the court, the attachment was wrongfully sued out, and the plaintiff would be entitled to recover such damages as, under all circumstances, the jury should deem proper, regardless of all other matters; and that upon all the facts, it was for the jury to determine whether or not the defendant had

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changed his domicil at the time of suing out said attachment.

The jury rendered a verdict for twenty dollars for the plaintiff. The defendant moved the court for a new trial. This motion was overruled and judgment rendered, and defendant appealed.

*R. J. McKinney*, for plaintiff in error.

*Peck*, for defendant in error.

REESE, J. delivered the opinion of the court.

The plaintiff in error some years since sued out an attachment bill against the defendant, in the Chancery Court at Dandridge, as a non-resident debtor; in the trial of which it was determined by the Supreme Court, at this place, for the reasons stated in the report of the case, (1 Humphreys,) that the Court of Chancery had no jurisdiction, the residence and domicil of the defendant, upon the facts proved in the case, being held by the court to have continued in Tennessee, and not to have been transferred to Georgia, as alledged in the attachment bill.

This action on the case was brought by Story against Smith, to recover damages for the wrongful suing out of the attachment and costs of suit. Upon the trial of the cause in the Circuit Court, two questions were made by the counsel of defendant, Smith, upon which the charge of the court was requested.

1st. That the plaintiff's action was misconceived, and that his remedy, if any, was upon the bond taken on the filing of the bill and the issuance of the attachment.

2d. If the action in the form brought could be maintained, that then it was incumbent on the plaintiff to make out, as required in an action at common law for malicious prosecution, that the proceedings in said bill and attachment were false and unfounded; that they were instituted without reasonable or probable cause; that there was malice on the part of the complainant in instituting the same, and that the injuries and wrongful acts alledged in the declaration were not of a character to entitle the plaintiff to recover damages in this action.

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Upon the first point, the court charged, that it was indispensably incumbent on the plaintiff, before entitling himself to any right of action on the attachment bond, first to bring an action on the case for the wrongful suing out of the attachment, in order to ascertain his damages; and on the second point, the court charged, that falsehood in the matter of the former suit, want of probable cause, malice, and the nature of the damages or injury sustained, applied only to common law actions, but not to this action; that this was a mere action or remedy prescribed by our own attachment law, to which these common law principles did not apply; that the Legislature intended to make the simple fact of the wrongful suing out of the attachment, under any circumstances, actionable, &c.

As to the first point we do not think there is any error in the opinion of the court, of which, at least, the plaintiff in error can complain. The proposition of the counsel, that in every case the action for the wrongful suing out of the attachment must be brought upon the bond, is certainly too broadly laid down. The bond is given to secure the payment of the costs and damages that may be recovered for wrongfully suing out the process; that recovery need not be in the first instance upon the bond. It would be inconvenient, to say the least, to sue the principal and surety upon the bond for the purpose of ascertaining the damages which he is entitled to recover, the non-payment of which would constitute the breach of the bond to be assigned in such actions. On the other hand, the bond is to secure costs as well as damages for wrongfully suing out the process. And we are not prepared to say, that an action could not be brought upon the bond to recover both.

The second point involves the enquiry, whether, if a party, his agent or attorney, under the influence of the strongest probable cause, and the most unquestionable *bona fides*, shall sue out an attachment, at law or equity, and shall be mistaken on the score, either of defendant's indebtedness, or of his conduct and situation entitling the plaintiff to the process, or if the magistrate or clerk shall omit to pursue the form of law, so that the process be quashed, such party shall, in any or in all these cases, be held liable to action, and be subject to damages.

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The charge of the court in this case implies, that such would be the fact. In this we think the Circuit Court was mistaken. Much as the attachment laws have been abused in practice, and rigid as has always been the supervision of the courts over the conduct of plaintiffs seeking to enforce them, it has never hitherto been held, that mere want of success in maintaining the action or the process, shall *per se*, put the plaintiff in the wrong, and subject him for such wrong to the action of the defendant. The statute provides for no such thing; it specifies no ground of action; it merely requires bond to secure such damages as may be recovered. For the grounds and principles upon which damages shall or may be recovered, the jury are to look to the common law. Is there an abuse of the process of the court? Is the claim of the plaintiff false? Was there no probable cause to resort to the use of the process? Was there *mala fides*? Were fraud and oppression the object of the suit, or of resort to the process? Such are the facts, or some of them; such the motives which must be attached to the conduct of the plaintiff in the attachment suit. To hold, that any plaintiff at law or in equity, who sues by attachment and process, subjects himself, without more, to an action, would fill the courts with suits, or suppress the use of the process altogether. The principles of the common law, therefore, on the subject of actions for malicious suits, must apply, modified by the nature of the case. Such is the opinion of the courts of North Carolina, and we are not aware of the fact, that it has been otherwise held any where. Let the judgment be reversed and a new trial be awarded.

**KIRKLAN & HICKSON vs. BROWN's adm'rs.**

Where money had been paid under a judgment of a court of competent jurisdiction, it can never be recovered back by another action. The judgment rendered being, so long as it remains in full force, conclusive, to all intents and purposes, of the rights of the parties.

Assumpsit in the Circuit Court of Hamilton county, by Brown's administrators against Kirklan & Hickson. Plea; non-assumpsit—issue. It was submitted to a jury at the April term, 1843, Keith, Judge, presiding, and resulted in a verdict for the plaintiff for the sum of \$103 65. A new trial was moved for, overruled, and judgment rendered, from which the defendant appealed in error.

*Jarnigan*, for plaintiff in error.

*Vandike*, for defendant in error.

REESE, J. delivered the opinion of the court.

Plaintiffs in error, upon a reference to arbitrators, had obtained an award against defendants' intestate for the sum of about seventy-five dollars, in a case depending in court, and where the arbitrament was made under the rule and by the order of the court. Before judgment had been given upon the award, Brown filed a bill in the Chancery Court, and obtained an injunction. His Honor the Chancellor, by his decree, dissolved the injunction and gave judgment in his court for the seventy-five dollars. This court, however, upon appeal in that case, held that although the decree dissolving the injunction was correct, yet it was not proper for the Chancellor to have given judgment for the money; for on grounds connected with the conduct of the arbitrators or attornies, the court of law might not give judgment upon the award; and it left the parties freed from the injunction, to take their own course in that respect. Subsequently to this, the award was made the judgment of the Circuit Court by the rendition of a formal judgment thereon; this judgment was not appealed from, and is unsatisfied and in full force. Upon this judgment an execution issued and the



[Kirklan &amp; Hickson vs. Brown's adm'rs.]

amount of it was collected from Brown, and the execution and judgment satisfied. This suit is brought by Brown's representatives, to recover back the money collected on said execution, upon the ground, that some time before the Circuit Court gave judgment upon the award, plaintiffs and Brown had had a settlement of their dealings and claims, in which the seventy-five dollars due by the award had been included. This as a matter of fact, from what is shown in the whole record before us, may be very questionable. But the jury having found the testimony to be so, we would not upon that ground disturb their verdict. But we are very clear, upon well settled principles of law, that the action is not maintainable. *A priori* views of reason and policy would so settle the question, if it could be, from its nature, new or open. If a party, without moving for a new trial, or taking an appeal, or resorting to proceedings in error, *coram nobis* or *coram vobis*, or proceedings in the nature of, or substituted for, an *audita querela*, or filing his bill in Chancery, might pay the money in the judgment recovered against him, and, then, in the same tribunal, be permitted to sue, in order to recover any portion of it back on the ground that the money was not justly due, in whole or in part, when would there be even a hope that litigation would cease? And, if the plaintiff in the last suit succeeded, and the defendant paid it back, what would prevent him, in a third suit, from asserting the correctness of the first judgment? In the great case of *Moses vs. McFarlan*, 2 Burr, 1005, the *ex equo et bono* principle of the action of assumpsit, announced by Lord Mansfield, as well as the facts and circumstances of that case, might seem to give some ground for the maintainance of a suit like this. But of that case, as well as of some others determined by Lord Mansfield, it may be said, *materiam superavit opus*. The great principles marked out and developed by his original and powerful intellect, remain to guide us; but their framework, the facts and circumstances to which they were appended, not always appropriate, have in some instances given way and ceased to sustain them. Of the case of *Moses and McFarlan*, it was said by Ch. J. Eyre, 2 H. Blackstone, 416, "that that judgment did not satisfy Westminster Hall at the time; that he never would

[Kirkham &amp; Hickson vs. Brown's adm'rs.]

subscribe to it; it seemed to him to unsettle foundations." And afterwards, in the case of *Marriat vs. Hampton*, 7 Term. R. 269, where it appeared, that the defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid, and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again and he gave a *cognovit* for the cash. The plaintiff afterwards found the receipt, and brought this action for money had and received, in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord Kenyon, Ch. J. was of opinion, at the time, that after the money had been paid under legal process, it could not be recovered back again, *however unconscientiously retained by the defendant*, though the case of *Moses and McFarlan*, was referred to, and the plaintiff was non-suited. And upon a motion being made for a new trial, Lord Kenyon said, "I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by due process of law, there must be an end of litigation, otherwise there would be no security for any person. I cannot, therefore, consent, even to grant a rule to show cause, lest it should seem to imply a doubt." That case has been followed ever since, and it has become a fixed principle, that when money has been recovered by the judgment of a court, having competent jurisdiction, the matter can never be brought over again by a new action. For until the judgment is set aside or reconsidered, it is conclusive, as to the subject matter of it, to all intents and purposes.

The case before us falls within the scope of these principles, and must be controlled by them. The judgment must be reversed and a new trial be had in the Circuit Court.

**NICELY vs. BOYLES.**

A partition bill filed by one heir against the others, and a decree thereupon for partition, does not estop any one of the others from asserting his claim to any portion of the land by action of ejectment. A bill in Chancery for partition, is not a bill to settle conflicting rights, but to divide that which belongs to tenants in common or joint tenants amongst them; and if the title be disputed, partition will not be made until the dispute is settled by suit for that purpose instituted.

Ejectment for 122 acres of land in Claiborne county, by Nicely against Boyles. It was submitted to a jury on the general issue, at the September term, 1841, Robert M. Anderson, Judge, presiding, and resulted in a verdict and judgment for plaintiff. The defendant appealed in error. All the material facts are stated in the opinion of the court.

*Peck*, for plaintiff in error.

*McKinney*, for defendant in error.

**TURLEY, J.** delivered the opinion of the court.

This is an action of ejectment brought against the plaintiff in error, and the bill of exceptions shows the following facts:

The premises in dispute were granted by the State of North Carolina, to Robert King, in 1795, and were sold and conveyed to John Bullard by George Sniffer, sheriff of Claiborne county, by virtue of a judgment and execution against Robert King, in 1807, and by John Bullard to George Buler, in 1807. Geo. Buler died about the year 1818, leaving Elizabeth Nicely, Woody Buler and several others his heirs at law. In July 1837, a petition was filed by said Elizabeth Nicely and others, a part of the heirs of said George Buler against Woody Buler and others, the balance of said heirs, for a partition of said land. Woody Buler filed his answer to the petition and resisted the partition, claiming to hold the land in his individual right by virtue of a purchase from the heirs of said G. Buler, and a continued unmolested possession thereof for 14 years. Notwithstanding this defence, commissioners were appointed by the court to

[Nicely vs. Boyles.]

make the partition, and at the June term, 1838, of the Chancery Court at Tazewell, they made the report, partitioning the land between the heirs of George Buler, deceased, which was confirmed by the Chancellor. By this report and the decree thereon, the land sued for in this action was allotted to Elizabeth Nicely, and was by her sold and conveyed on the 22d day of January, 1838, to James Nicely, the lessor of the plaintiff. Upon the trial in the court below, the defence set up was, that Joseph Buler, the defendant, held as tenant of Woody Buler, whose title was perfect by operation of the statute of limitations. There was much proof showing that Woody Buler had been in the uninterrupted possession of the premises from the death of his father, George Buler, a period of more than twenty years, claiming to hold the same in his own right. But it was contended on the part of the plaintiff, that the record of partition, made by the Chancery Court of Tazewell, precluded the defence; that Woody Buler's title had been then adjudicated upon by the Chancellor, and determined against him; that the matter was *res adjudicata* and not open to investigation in this action, and so the Circuit Judge determined.

Is this defence correct? We think not. The bill for partition is not a bill to settle title, but a bill to divide that which belongs to tenants in common or joint tenants, among them in severalty, and if the title be disputed, partition will not be made until the dispute is settled in an appropriate form of action. A bill of partition is not this. Indeed the Chancellor (so far as we see) did not attempt to adjudicate upon the separate and exclusive right claimed by Woody Buler against the other heirs of George Buler, deceased, and to hold that Woody Buler is estopped by the decree of partition from having a legal investigation of his title in the action of ejectment, is to deprive him of an asserted right without a hearing.

We then hold that if Woody Buler, at the time of the partition, had the legal right as against the other heirs of G. Buler, the decree of partition did not deprive him of it, but that he ought to have been permitted to avail himself of it in his defence to the action of ejectment.

Did he have such legal right? We shall not at this stage of the

[Dickerson vs. Rogers.]

proceeding undertake to determine this question; there is much proof upon it, which ought to have been submitted to the jury under the charge of the court, and which must be done before this case can be finally determined.

The judgment will, therefore, be reversed, and the case remanded for a new trial.

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DICKERSON vs. ROGERS.

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1. An inn is a house where the traveller is furnished with every thing which he has occasion for whilst on his way. It is not necessary that he should put up a sign as a keeper of an inn; it is sufficient if in fact he keeps one. If he do, he is liable to all the responsibilities of an innkeeper.
  2. An innkeeper is bound to provide safe stables for the horses of his guests; and if any injury should be sustained by the horses, the result of negligence in securing them properly, or the result of an imperfect and badly constructed stable, such injury must be compensated in damages by the innkeeper.
  3. There is no law requiring an innkeeper to obtain a licence to authorize him to exercise his occupation; yet, if there were such a law, and the innkeeper failed to get a licence, his failure in that respect would not shield him from the responsibilities of his occupation.

Dickerson was the keeper of a public inn in Tazewell, Claiborne county. The plaintiff, Rogers, on the 18th day of September, 1839, put up and was then and there received into said inn as a guest by the said Dickerson, and the horse of the plaintiff was taken to the stable by the servant of Dickerson. Whilst there, the plaintiff's horse got his head fastened in the partition wall which separates the stalls. In struggling to get loose, he was so bruised and injured, that he shortly thereafter died. The horse was worth eighty or a hundred dollars, and was as gentle as most horses. Rogers, the owner of the horse, at the January term, 1840, of the Circuit Court of said county, brought his action of trespass on the case against the said Dickerson, to recover damages which he had sustained in consequence of the loss of his horse. The defendant pleaded not guilty, and issue was taken thereupon. At September term, 1842, the case was submitted to a jury, Luckey, Judge, presiding. The jury re-

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turned a verdict in favor of plaintiff, and assessed his damages at eighty-five dollars. The defendant moved for a new trial, which was refused, and judgment entered for the damages assessed. Defendant filed his bill of exceptions, and prayed an appeal in the nature of error to the next Supreme Court at Knoxville.

*McKinney*, for plaintiff in error.

*Peck*, for defendant in error.

GREEN, J. delivered the opinion of the court.

This action is brought by Rogers against the plaintiff in error as an innkeeper, charging that she so negligently kept his horse while he was a guest at her inn, that his horse was injured and died.

It appears from the proof, that the plaintiff's horse was put in the stable of the defendant, and while there, thrust his head through an opening of the partition between the stalls above the trough; that the plank immediately above, being loose, slipped down and pressed his neck so that he could not withdraw his head; and while thus fastened, his exertions to get loose injured him so seriously, that he died in a short time.

The court charged the jury in substance, that an innkeeper is bound to take all possible care of the goods of his guests; and that if through any default of him or his servants, any injury or loss should occur, he will be liable in damages for the value of the property lost. But if the injury occur through accident, and from no default or neglect of the innkeeper or his servant, he will be exonerated from liability.

An innkeeper is bound to provide safe stabling for the horses of his guests, and so constructed and arranged that the horses placed within it will be secure and safe from injury; and if owing to the defective and imperfect construction of the stable, or its stalls, an injury is done to the horse of the guest, the innkeeper will be responsible for the injury. But if an injury result to a horse in consequence of his vicious habits, and not through any

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negligence or want of care of the innkeeper and his servants, he would not be liable therefor.

The jury found a verdict for the plaintiff for the value of the horse, which the court refused to set aside, and the defendant appealed to this court.

It is not seriously insisted, that the charge of the court is erroneous, nor indeed could it have been done successfully. It is laid down by Chancellor Kent, (2 Com. 2 ed. 593,) upon the authority of the English cases, that an innkeeper is bound to keep safe the goods of his guest deposited within the inn, except where the loss is occasioned by inevitable casualty, or by superior force, as robbery. And Mr. Justice Story says, (Law of Bailments, 306, sec. 470,) that an innkeeper is bound to take, not ordinary care only, but uncommon care of the goods and baggage of his guests. If, therefore, the goods or baggage of his guest are damaged in his inn, or are stolen from it by his servants or domestics, or by another guest, he is bound to make restitution.

Rigorous as this rule may seem, and hard as its operation may be in a few instances, it is founded on the great principle of public utility, to which all private considerations ought to yield. "For," as Sir William Jones justly observes, (Bailments, 95,) "travellers, who are most numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innkeepers, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them."

Upon these principles it is clear, that the Circuit Court was right, in holding that the innkeeper was bound to provide safe stables for the horses of his guests; and that any injury sustained by the horse, the result of negligence in securing him properly, or of an imperfect and badly constructed stable, must be compensated in damages by the innkeeper.

If this rule was not inflexibly enforced, no traveller would be safe in entrusting his horse to the hands of the innkeeper, until

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he had first inspected his stables, and selected a place for his horse to be kept, an inconvenience which could not be endured.

But it is insisted, that the plaintiff in error was not an ordinary innkeeper, because she had obtained no licence to keep an inn, as the act of 1811, ch. 113, requires.

We are of opinion this act is not in force. By the act of 1835-6, ch. 13, sec. 4, it is provided, that "each and every keeper of a tavern, or house of public entertainment, shall pay annually a tax of five dollars; provided, that such licence shall not authorize the retailing spirituous liquors unless such privilege is mentioned in the licence, in which case twenty-five dollars shall, in addition to the said sum of five dollars, be paid for such licence. By the act of 1837-8, chapter 37, so much of the act of 1835-6 as imposes a tax on a tavern keeper, or requires him to obtain a licence, is repealed: and by the act of 1837-8, chap. 120, all laws taxing retailers of spirituous liquors are repealed. The act of 1835-6 is inconsistent with the acts of 1811 and 1823 upon the same subject, and by implication repeals those acts; and when by the act of 1837-8 it is repealed, there is no law authorizing or requiring licences to be granted to innkeepers, for the repeal of the act of 1835-6 does not revive the acts of 1811 and 1823.

The act of 1811 inflicted a penalty upon any person who should retail spirituous liquors unless such person should have a licence to keep an ordinary, or house of entertainment. The licence which was required, by the first section of the act, to be obtained, was intended to protect the community against the mischief which the legislature saw must result, if any person, however unprincipled and debased, were permitted to retail spirituous liquors. Hence they required that the county court shall be satisfied of the good character of the applicant and that he is prepared to accommodate travellers, and that the principal object in obtaining a licence is not to retail liquors. But the acts of 1837-8 having prohibited the retail of spirituous liquors altogether, and having repealed the law requiring tavern keepers to obtain licence, we think the acts of 1811 and 1823 stand repealed.

What, then, constitutes a person an innkeeper? In the case



[Hale vs. Hale.]

of *Thompson vs. Lacy*, 3 Barn. & Ald. 283, an inn is defined to be "a house where the traveller is furnished with every thing which he has occasion for whilst on his way." Judge Story, (*Bailments*, sec. 775,) quotes this definition with approbation. It is not necessary that a party should put up a sign as a keeper of an inn. It is sufficient if *in fact* he keeps one. If he do, he is liable to all the responsibilities of an innkeeper. And this we think would be so, though he had failed to obtain a licence, should the statutes require one. It would be another question, whether, if a party fail to comply with such provision of a statute, he shall be entitled to all the rights and privileges of an innkeeper.

Upon the whole, we think there is no error in the record, and that the judgment must be affirmed.

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#### HALE vs. HALE.

1. An admission of indebtedness to a specific amount and an express promise to pay are not necessary to take a case out of the operation of the statute of limitations. It is sufficient if an indebtedness be admitted in reference to a *particular subject matter* and a willingness be expressed to pay so much as may be due. The sum due may be ascertained by the proof.
1. The defendant, as agent of complainant, discharged incumbrances on land, which complainant had purchased, with the complainant's money and took title in his own name, and afterwards sold the land as agent and received the proceeds. Held, that a court of chancery had jurisdiction to decree an account.

This bill was filed by Hale against Hale in the Chancery Court at Pikeville, for an account. It was heard on bill, answer, replication and proof at the March term, 1843, before Chancellor Williams. He dismissed the bill, and complainant appealed. All the material facts are stated in the opinion of the court.

*Brazeale*, for complainant.

*Baird*, for the defendant.

[Hale vs. Hale.]

GREEN, J. delivered the opinion of the court.

About the year 1827 or 1828, the complainant purchased a tract of land from Daniel O. Baker for six hundred dollars, but before the purchase money was paid or a conveyance of the land, Baker's creditors levied on it and sold it. To secure the land he had purchased and to get it free from incumbrances, the complainant employed the defendant as his agent to buy in the land for him. The defendant did buy in the land, but took the title in his own name. He afterwards, as agent of the complainant, sold the land for six hundred dollars, and now refuses to account with the complainant, pleads the statute of limitations, and insists that a court of chancery has no jurisdiction to afford relief.

1. We think the repeated acknowledgments of the defendant, that he owed the complainant, and was willing to pay him what was right, are sufficient to take the case out of the operation of the statute of limitations.

In the summer of 1842, John Hale, the defendant, admitted in the presence of A. H. Montgomery, Clerk and Master of the Chancery Court at Pikeville, that he owed Richard Hale, and if he would do within one hundred dollars of what was right, he would pay him. In 1840, he said in presence of J. H. Spears, if Richard Hale would make a fair settlement, if he owed him he would pay him. Many acknowledgments of a similar character have been proved in this cause, made at various times since the agency of the defendant commenced; so that the indebtedness of the defendant to the complainant to some extent is established beyond doubt.

But it is said, no specific sum was admitted to be due, nor was there any promise to pay. This is true; but we think admissions of indebtedness in a specific sum, and an express promise to pay, are not essential to take the case out of the operation of the statute of limitations. It is enough if an indebtedness be admitted in reference to a particular subject matter, and a willingness be expressed to pay such amount as may be due. If it were necessary that the acknowledgment should state the

[Hale vs. Hale.]

precise sum due, it would be scarcely ever possible to prove an admission which would take the case out of the statute. Some adjustment of accounts between the parties is almost always necessary in order to ascertain the amount due.

We do not mean to say, that a general admission of indebtedness will authorize a plaintiff to prove any accounts he may produce, however variant in their origin and remote from the meaning of the party making the admission. The admission must refer to a particular subject matter of indebtedness, so that if the sum be not specified in the admission, it may be made certain by the proof.

2. There is no objection to the jurisdiction of chancery in this cause. The complainant paid for the land to Baker, and the title was taken to the defendant; hence a trust resulted in favor of the complainant. The sale of the land and receipt of the proceeds, and the disbursements for clearing off incumbrances, have been performed under the trust and confidence reposed by virtue of the original agency. The character of the case here presented is therefore fit, because of the trust between the parties, and because it is an adjustment of mutual accounts, for the jurisdiction of the court. If, therefore, in such a case a court of law might have afforded relief, it does not follow that equity has not also jurisdiction, especially as the defendant did not demur, but has answered the bill and submitted to the jurisdiction. 2 Jh. Ch. R. 369.

The decree must be reversed, and a decree for an account must be entered.

## SMITH vs CLICK.

The defendant in payment of a horse delivered bank bills to plaintiff, which were known to defendant to be worthless at the time, and unknown to the plaintiff, with an agreement that if the notes were not returned in a given time, the defendant should not be bound to receive them. Held, that it was a fraud, and that plaintiff had a right to recover the value of the horse, though he did not return the notes within the time limited.

Click instituted this action on the case against Smith, in the Circuit Court of Green county. Plea, not guilty; and an issue on this plea was submitted to a jury at the June term, 1843, Luckey, Judge, presiding; when a verdict was rendered in favor of the plaintiff, for the sum of ninety-eight dollars. The defendant moved for a new trial. The motion was overruled, and judgment was rendered on the verdict, from which the defendant appealed.

The facts of the case and the charge of the Circuit Judge are set forth in opinion which follows.

*R. J. McKinney*, for plaintiff in error.

*Arnold*, for defendant in error.

GREEN, J. delivered the opinion of the court.

The plaintiff in error purchased a horse, saddle and bridle from the defendant in error, for the sum of eighty dollars. Smith offered to pay the eighty dollars in notes, purporting to be issued by a banking company in the State of Georgia, called the Pigeon Roost Banking Company, but which company did not, in fact, exist. Click enquired if the notes were good; to which Smith replied, they were good to him. It was then agreed that Click was to receive the notes, and ascertain whether they would answer his purpose; and if they should not be received by his creditors, he was to return them by a given day. The notes were worthless, and Click offered to return them, but not until after the day stipulated in the contract. Smith then refused to receive them, or to surrender the horse. Afterwards, Click said in presence of Smith, that he knew they were worthless,

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for he had passed this money five or six times, and taken it back. To which Smith replied, he had not taken it back more than *two or three* times.

The court charged the jury in substance, that fraud vitiates every contract into which it enters; and that if Smith knew the notes he gave Click were worthless, and concealed that knowledge, or falsely suggested that they were good, when he knew they were bad, it would be a fraud on Click, who might disregard the contract and sue for the value of his horse; and that the existence of the condition in the contract would make no difference; but that if Smith believed the notes were genuine, and was guilty of no fraud, Click was bound to return them on the day fixed in the contract, and not having done so, he could not recover.

The jury found a verdict for the plaintiff. The defendant moved for a new trial, which was refused, and an appeal was taken to this court.

It is now insisted for the plaintiff in error, that Smith could be guilty of no fraud, because no confidence was placed in him; that Click, disregarding what Smith said about the matter, determined to ascertain for himself whether they were good, and with that view stipulated a future day at which he should be permitted to return them.

It may be, and doubtless is true, that Click did not repose *full* confidence in Smith; for if he had, he would have received the notes without condition: but it is equally true, that Smith's representations made *some* impression on his mind, and to some extent took his confidence. If Smith had said to him, "I offer you these notes for your horse, but they are worthless; there is no such banking company in Georgia; I passed them two or three times, and have always been obliged to take them back;" is it to be believed, that Click would have taken them with a view to ascertain their character, already so fully disclosed? Surely not. Smith's representations had the effect to induce Click to take the notes; and although he had a right to return them, doubtless Smith hoped he would not do so, as the day fixed was an early one.

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We think the jury were well warranted in finding that Smith was guilty of fraud. It is not seriously insisted, that the court erred in the charge to the jury. Certainly the condition in the contract may be affected, and vitiated for fraud, as well as any other stipulation in it. Chitty on Contracts, 527 et seq; Comyn on Contracts, 66-7; 2 Kent's Com. 482-3.

Let the judgment be affirmed.

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LOWRY vs. HARDWICK.

1. By an act of assembly, a creditor may sue any one or more of several joint obligors or partners; and such suit is no bar to a suit subsequently brought against the remaining partners or obligors.
2. Where two of a firm (which was composed of three) were sued on a debt of the firm, and the execution was stayed by a third person, who was compelled to pay the same; held, that the surety for the stay of execution could maintain an action against the third member of the firm who was not sued, for money expended to and for his use.

An action of assumpsit was brought by Hardwick in the Circuit Court of McMinn county against William Lowry, of the firm of Lowry, Wasson & Co. for money expended by the said plaintiff, to and for the use of said firm.

Defendant pleaded non-assumpsit. The case was submitted to a jury at the December term, 1842, of said court, Keith, Judge, presiding. The jury returned a verdict for plaintiff, and assessed the damages at fifty-two dollars and thirty-two cents. A motion was made for a new trial, which was overruled; the defendant excepted, and prayed an appeal in the nature of a writ of error to the next Supreme Court at Knoxville.

The facts of the case and the charge of the Circuit Judge are contained in the opinion of the court.

*Trewhit* and *Gaut*, for plaintiff.

*Brazeale*, for defendant.

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GREEN, J. delivered the opinion of the court.

It appears from the bill of exceptions, that the firm of Lowry, Wasson & Co. was indebted to Rhea, Ross & Co. in the sum of one hundred and ninety-six dollars and two cents, which was secured by a note due 23d of January, 1840. The firm of Lowry, Wasson & Co. was composed of B. H. Lowry, M. Wasson and William Lowry. Rhea, Ross & Co. sued B. H. Lowry and M. Wasson, two of the members of the firm of Lowry, Wasson & Co. before a justice of the peace, who rendered judgment for one hundred and ninety-nine dollars and eighty-seven cents, on the 28th March, 1840; and the defendant in error became surety for the stay of execution, and has since been compelled to satisfy said judgment. He now brings this suit against William Lowry, the other member of the firm of Lowry, Wasson & Co. to recover the amount so paid by him.

The court charged the jury, that if William Lowry was a member of the firm of Lowry, Wasson & Co. and judgment was rendered on said note against the other two members of the firm, and the plaintiff stayed the execution and afterwards paid the judgment, William Lowry was liable to refund to him, and the law raised a promise upon which this action could be maintained. The jury found for the plaintiff, and the defendant appealed to this court.

There is no error in this charge of the court. The judgment of Rhea, Ross & Co. against B. H. Lowry and M. Wasson was not a merger of their claim against Lowry, Wasson & Co. to prevent them afterwards from suing the other partner, William Lowry, had they failed to make their debt by their suit against the other two partners. The act of assembly, by which a party is permitted to sue any one or more of the joint obligors or partners, does not make such suit a bar to a suit which may be subsequently brought against the remaining partner or joint obligor. As there was no merger of the simple contract created by the note, so as to make the suit against B. H. Lowry and Wasson a bar to any other suit against William Lowry, it follows, that a payment by Hardwick, of the debt due to Rhea, Ross & Co. at the instance and as surety for B. H. Lowry and Wasson,

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two members of the firm, was a payment for the whole firm. Unquestionably, if without suit Hardwick had paid this debt for the firm, at the request of two members of it, the entire firm would have been his debtor for so much money laid out and expended for them, and he would have had his action against all or any one member of the firm, upon the implied promise to pay. The fact that he paid it, as surety for the stay of execution for two members of the firm, can make no difference as to the rights and liabilities of the parties, unless the judgment against the two was a merger of the liability of all by the simple contract, and this we have seen was not the case.

The case of *Crane vs. French*, (1 Wend. R. 311,) is very different from this. These French, one of the partners, executed a warrant of attorney under seal, authorizing an attorney to appear for him and confess judgment. A judgment was taken *against both parties*. The court held, that the statute of New York that provides, that if the process be issued against joint debtors, and any one be taken and brought into court, judgment may be entered against all, does not apply to cases where one joint obligor voluntarily confesses a judgment. In such case, the judgment is only valid and binding upon the party making the confession, and his property alone can be sold. The court held further, that the bond and warrant of attorney executed by French, to confess judgment, was an extinguishment of the partnership debt, and consequently there was no liability on part of the other party to pay it.

We have seen, that in this case, there was no extinguishment of the debt; that William Lowry still remained liable to Rhea, Ross & Co. until their debt should be satisfied; and consequently, the payment by Hardwick, at the instance of B. H. Lowry and Wasson, was a payment for the firm, and that the law raises an implied promise on the part of each member of the firm, to refund the money so paid.

Affirm the judgment.



*PETTITT'S ex'rs. vs. PETTITT et als.*

1. Suicide is not conclusive evidence of insanity, yet it is admissible evidence to show the absence of a sound and disposing mind.
2. The verdict of a jury, which the Circuit Judge has refused to set aside, will not be disturbed in the Supreme Court, unless the preponderance of evidence is greatly against it.

An issue was made up in the County Court of Meigs county, by the heirs at law of Pettitt, deceased, to try the validity of an alleged will, offered for probate by those named in the alleged will as executors, and it was certified to the Circuit Court, and came on for trial at the September term, 1842, Keith, Judge, presiding. It was submitted to a jury, who, under the charge of the judge, rendered a verdict against the validity of the will, and judgment was rendered on it. The plaintiffs appealed.

*Trewhitt and Gaut*, for plaintiffs.

*Bradford*, for defendant.

REESE, J. delivered the opinion of the court.

This record presents a question of sanity or insanity upon an issue of *devisavit vel non*. The paper presented as the last will and testament of James Pettitt, bears date on the 10th February, 1842. It has no attesting witness, but is well proved to be altogether in the hand writing of the deceased. It was found in a trunk where specie was kept, and where there were other valuable papers. It bore date six days only before the death of Pettitt, and was no doubt prepared and deposited, where it might be found, in view of that event, then, if not earlier, meditated by the deceased. He died by suicide. He had once lived on the Georgia road and kept entertainment for travellers, but he had been for some time living in retirement, at a place called Fort Morrow, with no family about him but his slaves. His family had never lived with him in this county. From some of the testimony, it seems that he had become considerably deaf, and had a pain in his back; and his health began to be impaired. Some years before, he proposed to one witness

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to sell his negroes, saying he wanted to travel. While talking on this subject, witness thought he had singular actions, a strange stare, and a wild look. In October, 1841, he accompanied, on horse back, another witness, who lived some sixty miles from him, a little distance from his house, having previously told him that he had something important to communicate, and when they got to a secluded place, he seemed to hesitate for a moment, looked queer, and said, "I'll now tell you my business;" he then said he was dissatisfied. "You discover" said he, "that I am hard of hearing." He then said, "he had heard there was a doctor in Kentucky who could cure him, and he wanted to go and see him; that he wanted to *ramble any how*; and if he could find some good man to take care of his farm and negroes he would go and see this doctor in Kentucky, and he would ramble;" and proposed to witness to come and take care of his affairs for him. Witness said it did not suit him. Pettitt looked strange while talking to witness on this subject; was silent for some little time, then said, "he was born in a fort, and reckoned he would die in a fort." A few days before the date of the will, a female relation staid all night at his house. He had a newspaper in his hand when she went in; spoke twice to him without his noticing her. Witness put her hand on his head; he jumped up and apologized, and said, "I am glad to see you over here cousin Sally;" he then shoved her a chair and walked out of the house; was gone a minute; when he came back he commenced stirring the fire, and holding the tongs in his hands. He said, "Cousin Sally, I have given my pipe and tobacco to Sanders, and all the devils in hell can't make me smoke again;" he looked strange when he said this, and he let the tongs fall on the hearth. Witness said, "why do you say that to me, cousin James," and he said, "well I will just tell you, all the devils in hell can't make me smoke again;" then speaking of another cousin, and his little daughter, he said, "when Frank comes we must have a dance;" and then jumping up, said, "see here, I can dance," and kicked his feet together, adding "that he felt as if he was only sixteen years old." Pettitt lay groaning the whole night, and slept none, and in the morning told witness that he had not had a good night's sleep

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for three weeks. A few days after, Frank and the girls did come down, and they had a dance, and Pettitt danced. Circumstances of strange and deep abstraction, in the conduct and manner of the deceased, when at the county village, a day or two before his death, are proved by several witnesses. We have selected this testimony from the record to show, that there was proof before the jury, upon which their verdict, against the validity of the alleged testamentary paper, may be rested. On the other hand, there is much testimony that tends to show that the deceased was of sound and disposing mind and memory. In such cases, where the Circuit Court has refused a new trial, the well settled and inflexible rule of this court is, to suffer the verdict to remain, where there is any testimony to sustain it, unless there be error in matters of law.

We think there is nothing erroneous in the charge of the court. It has been supposed that the court charged, that the fact of suicide was of itself complete evidence of insanity. There is nothing of this sort in the charge. He told them to scan the history of the deceased, from the first acquaintance of the witness up to the date of the will; that the important question was, what was his mental condition about that time? Was he under the influence of delusion or not? Then they would enquire into his conduct up to the day of his death; and examine the circumstances of that catastrophe, "which they might take into consideration by way of ascertaining all about the condition of his mind." Then he added, that the counsel had intimated that self-murder is of itself an evidence of insanity; and that this intimation was combatted with learning and ability by Seargent Hawkins; and then there is a digression about the law of forfeiture in England, and its abolishment by our constitution. And, then, in the close of the charge, the jury are instructed to take all the facts and circumstances together, and to judge for themselves. The error of the court, if any, was in giving too little, rather than too much weight, to that circumstance. A will prepared in view of suicide, and of course under the influence of the morbid and unhappy feelings leading to that catastrophe, must, where its validity is in question, be largely affected by that circumstance.

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Again it is said, that there was no proof shown to the county court, where the issue was made up, establishing the heirship of the caveators. We cannot tell how this was. No bill of exceptions was taken in the county court. The record only stating that the propounders do not admit the heirship. So the question discussed has not been raised by the record.

Upon the whole, we feel constrained, by what is shown in the record, and by the well settled doctrine of this court in cases of new trial, to affirm the verdict and judgment of the Circuit Court.

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#### WRIGHT vs. THE STATE.

1. It is no ground in law, either of demurrer or arrest of judgment, that several distinct felonies of the same degree, though committed by defendant at different times, should be inserted in the same indictment, yet if shown to the court before plea, it is within the discretionary power of the court to quash the indictment, or after plea, to compel the prosecutor to elect on which count he will proceed.
2. The indictment charged in one count, that Wright committed a rape on the body of Tabitha Webb, on a given day: and in another, that he on the same day had carnal knowledge of Tabitha Webb, she being under ten years of age: Held, that he was intended to be charged with but one offence.
3. The principles of the case of *McGowan vs. The State*, 9 Yerger, 184; *Payne vs. The State*, 3 Humphreys, 357, recognized.
4. The court charged the jury, that if the female assaulted, consented through fear, or consented after the fact, or was taken at first with her consent, if she was afterwards forced, the offence was committed: Held that there was no error in this charge.

Wright was indicted in the Circuit Court of Knox county, at the October term, 1842. The indictment contained two counts. The first for a rape committed on the body of Tabitha Webb, on the 15th day of August, 1842, in the county of Knox; the second for having on the same day, in said county, had carnal knowledge of said Tabitha Webb, she being a female child, under the age of ten years.

The defendant pleaded not guilty, and an issue thereupon was submitted to a Jury at the January term, 1843, Scott, Judge, presiding.

It appeared that the defendant had gone to the house of the

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mother of Tabitha Webb after dark, in the county of Knox, and that the mother sent her daughter Tabitha, who was over ten years of age, after water, and that Wright went with her to which she made no objection. There were some circumstances going to show, that she was willing to go with him, and was willing to receive his dalliance; but her screams when violence was attempted, the bruises on her body, and her efforts to escape the assault of the prisoner, left no doubt of her unwillingness to assent to the desires of the defendant. These facts, together with the acknowledgment of the defendant, left no doubt of his guilt. There was proof introduced to show that the mother was a prostitute, &c. &c.

The Judge charged the jury, that it was no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken at first with her own consent, if she was afterwards forced against her will.

The jury returned a verdict of guilty on the first count, and not guilty on the second. A motion for a new trial was made and overruled.

The defendant, by his attorney, Swan, then moved in arrest of judgment, and assigned the following as the ground of his motion.

“The indictment joins offences differing in their nature, circumstances and name, constituting different and distinct felonies.

“The first count charges, that the defendant, in and upon one Tabitha Webb, spinster, violently, feloniously and unlawfully, did make an assault, and her the said Tabitha Webb, then and there unlawfully and feloniously did ravish and carnally know, contrary to the form of the statute in such case made and provided.

“The second count charges, that the defendant, in and upon one Tabitha Webb, spinster, a female child, under the age of ten years, &c., unlawfully and feloniously did make an assault, and her the said Tabitha Webb, then and there wickedly, unlawfully and feloniously did carnally know and abuse, contrary to the form of the statute, &c.; differing from the charge in the

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first count, in nature, circumstance and name, and constituting a separate and distinct charge."

This motion was overruled and defendant appealed in error.

*Swan*, for plaintiff in error.

*Attorney General*, for the State.

TURLEY, J. delivered the opinion of the court.

At the February term, 1843, of the Circuit Court of Knox county, the prisoner, Andrew J. Wright, was put upon his trial on a bill of indictment containing two counts, one of which charged him with the offence of rape, committed upon the body of Tabitha Webb; the other with the offence of having had carnal knowledge of Tabitha Webb, she being under age of ten years. The jury found him guilty on the first, and not guilty on the second; and sentenced him to ten years imprisonment in the jail and penitentiary of the State; and judgment was given accordingly. And a writ of error is thereupon prosecuted to this court.

We are glad to be freed from the necessity of entering into an investigation of the disgusting details of this offence, as exhibited in the bill of exceptions, as it is not insisted that a new trial ought to be granted upon the facts proven to the jury, but several legal objections are taken to the proceedings on the trial, which it is contended vitiate the verdict, and for which the judgment should be reversed. We will examine them as they arise in the argument of the prisoner's counsel.

1st. The court was asked to compel the Attorney General to elect upon which count of the indictment he would put the prisoner upon trial; which the Judge refused to do. In this it is insisted there is error; because the two offences cannot be legally joined in the same bill of indictment. Is this objection sustainable? We think not. Mr. Chitty in his Treatise upon criminal law, vol. 1st, page 235, says, "In cases of felony, no more than one distinct offence or criminal transaction, at one time, should regularly be charged upon the prisoner in one indict-

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ment; because, if that should be shown to the court before plea, they will quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenges to the jury; and if they do not discover it till afterwards, they may compel the prosecutor to elect on which charge he will proceed. But this is only matter of prudence and discretion, which rest with the judges to exercise. For in point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment, against the same offender, and it is no ground, either of demurrer or arrest of judgment."

For which positions are cited, 3 T. R. 105-6; 2d East Pl. Cr. 515; 2d Campb. 131; 3d Campb. 132; Burn's Justice, Indict, 4; 2d Hale, 173; 2d Leach, 1003; 8th East, 41.

These authorities are conclusive upon the question, showing that in point of law there is no objection to the insertion of several distinct felonies of the same degree in one bill of indictment, but that the court will in its discretion upon application, either quash the bill of indictment in such case, or compel the Attorney General to elect upon which count he will proceed; and that such joinder constitutes no ground of demurrer or arrest of judgment, and of course cannot be assigned as an error in a revising court. But it is also to be observed, that the two offences charged in this bill of indictment are not distinct and different. The wrong charged in both counts is the same, the person upon whom it was inflicted is the same, and the time of its perpetration the same, and the two counts were necessary to meet an unascertained fact, which, when ascertained, would characterise the offence, viz, the age of the person injured; if she were above the age of ten years, the offence would be rape; if under, the unlawful carnal knowledge of a female child; for both of which the punishment is the same. The case of *The People vs. Rynelers*, 12th Cowen, 425, which has been cited as authority, by the prisoner's counsel, does not controvert these principles, but sustains them. Chief Justice Savage, who delivered the opinion of the court, says; "That there would be an incongruity in incorporating in the same indictment, offences of a different character, such for instance, as forgery and perjury

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cannot be denied; and that in such case a court would refuse to hear a trial upon both, there can be no doubt. But when offences of the same character, differing only in degree, are united in the same indictment, the prisoner may and ought to be tried upon both charges at the same time. Such is this case. The prisoner is indicted for forging the check, and also for publishing it as true, knowing it to be false. These are different offences, and punished with different degrees of severity, but were properly united, both in the indictment and the trial."

2d. The second objection taken is, that the court erred in forcing the prisoner to challenge jurors, who, upon examination, stated that they had formed opinions relative to his guilt or innocence, upon rumors.

This question has been fully examined in the case of *McGowan vs. The State*, 9th Yerger, and is there settled against the prisoner; the principle of that decision has been followed ever since by this court, and we see no reason to change it.

3d. It is contended, that the charge of the Judge is erroneous in this, that he said to the jury, "It is no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken first with her own consent, if she were afterwards forced against her will." This charge is correct in every particular, and fully sustained by authority.

We have thus examined all the objections taken for the prisoner, and find that none of them vitiate the proceedings in the court below, and we, therefore, affirm the judgment.



## HALE vs. HENDERSON.

No action will lie to enforce a contract which is in violation of a statute, or of the common law, or which is immoral in its character, and contrary to public policy.

This action of covenant by Hale against Henderson, was tried before Judge Scott, and a jury of Monroe county, and resulted in a verdict and judgment for the defendant, from which the plaintiff appealed.

*Gillespie*, for plaintiff.

*Cannon*, for defendant.

GREEN, J. delivered the opinion of the court.

In the year 1819, the Legislature of Tennessee passed a law to dispose of the lands in the Hiwassee District. The said lands were sold at Knoxville; the sales commenced the first Monday of November, 1820. The plaintiff being about to bid for certain lands, the defendant, and Austin Rider, to induce him not to bid, and to obtain his agency in preventing other persons from bidding, executed the following instrument:

"We the undersigned promise to pay Hugh D. Hale, five hundred dollars, if we should get the land we want in the Tellico plains, or any part thereof that we may bid for; provided we get said land at eight dollars per acre; and also to pay one-fourth of the difference between what it may go at less than eight dollars, and eight dollars. Provided in no case he shall have a greater sum than one thousand dollars, including the five hundred first above mentioned. The fractions we mean are 128, 66, 111, 154, 138, 103. And I hereby agree to endeavor to keep every other person off said fractions. Witness our hands and seals, this 6th December, 1820. And a credit of twelve months be given for all but five hundred dollars.

THOS. HENDERSON, [Seal.]

AUSTIN RIDER, [Seal.]

This suit is brought against Thomas Henderson, one of the

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obligors in the above instrument, who pleads the facts above set forth; insisting that the contract was illegal, and that the obligation was void.

The contract set forth in this case, was a most fraudulent and iniquitous one. The public domain was exposed to sale; and the State had a right to obtain such price as it was fairly worth, and as purchasers, unbiassed and unaffected by any improper interference, would be willing to give. But the plaintiff undertakes, not only, that he will not bid himself for the lands the defendant wants, but that he will use his influence to prevent other persons from bidding; thus selling himself to prevent competition, and to permit the defendant to obtain the lands he wished to buy at a rate greatly below their value. He engaged not only to defraud the State, but to use a corrupting influence upon other bidders; and now having colluded with the defendant to defeat the law, he asks the aid of the law to enforce his contract. This cannot be done. No principle of law is better settled, than that no action will lie to enforce a contract made in violation of a statute, or of the common law, or which is immoral in its character and against public policy. In the case of *Wheeler vs. Russell*, 17 Mass. Rep. 257, the subject is fully discussed, and all the authorities are referred to and reviewed, showing that this has been the uniform doctrine of the courts of England and in this country. Let the judgment be affirmed.

## SMITH vs. BRITTON.

It is a fixed rule of practice in the introduction of testimony, that the plaintiff shall first bring forward all the testimony which goes to establish his claim; the defendant shall then introduce his proof upon matters of defence and his testimony, rebutting the proof adduced by the plaintiff; then the plaintiff, his proof, rebutting that of the defendant. After the plaintiff has introduced his proof to establish his claim, and the testimony of the defendant has been heard, the plaintiff can introduce no testimony in chief. The court has the discretionary power to relax this rule, where justice requires it should be done; but the judgment of the court will not be reversed for the relaxation of the rule, or refusal to relax it, unless the error be gross and palpable.

This action of trover and conversion was tried upon the plea of not guilty, by Judge Luckey and a jury of Green county, at the February term, 1842, and resulted in a verdict and judgment for the defendant, from which the plaintiff appealed.

*T. Nelson*, for the plaintiff.

*R. J. McKinney*, for the defendant.

**TURLEY, J.** delivered the opinion of the court.

This is an action of trover and conversion. Upon the trial in the court below, the plaintiff, to support his action, among other witnesses examined Samuel Smith: having closed his testimony in chief, the defendant introduced and examined several witnesses as to the general character of Samuel Smith, who deposed that they would not give him credit on his oath. The plaintiff then introduced Andrew Kennedy, and proposed to examine him as to his knowledge of the facts deposed to by Samuel Smith, for the purpose of showing that they were true: this was objected to, and the objection was sustained by the court, upon the ground that the testimony thus offered was testimony in chief and therefore not properly receivable at that stage of the proceedings, from which judgment of the court this writ of error is prosecuted.

The first question for consideration is, whether the proof offered and rejected was testimony in chief? That it was is obvious; for although the bill of exceptions does not show what facts Samuel Smith deposed to, yet as he was examined at the

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opening of the plaintiff's case, it is quite certain they must have been those upon which plaintiff's right to recover for the conversion of the property sued for rested: then an attempt to prove the truth of these facts by another witness is additional proof upon them, and not rebutting testimony, introduced for the defence: it is then testimony in chief.

2. The testimony offered being in chief, did the court err in rejecting it?

For the purpose of facilitating and expediting business, rules of practice have, from time immemorial, been adopted in all courts of justice. These rules, though not so binding and obligatory as those establishing rights, are nevertheless not departed from except at the discretion of the court; which discretion should not be exercised inconsiderately and for trivial causes.

Among other rules adopted, is the one regulating the mode for the examination of witnesses; it is a very important one and of very great antiquity: without it, the confusion in the examination of cases before a jury would be intolerable and the prolixity of investigations interminable. It provides, that the plaintiff shall, in the opening of the case, examine all his testimony which goes to establish his action; the defendant shall then introduce his proof upon his matters of defence and his testimony rebutting the proof adduced by the plaintiff; and then the plaintiff, any which may rebut that of the defendant, but nothing in chief, but by the permission of the court, which permission, as we have said, ought not to be extended except for good and sufficient reason shown, lest the good which results from the rule be destroyed, and the evil intended to be obviated be visited upon the courts in its full force. The relaxing of the rule, then, is a matter of discretion with the court; and so difficult is it to reverse for the exercise of a discretion, that many courts have refused to do so; but in this State it has been held, that the wrong exercise of a legal discretion is matter of error; but then it must be gross and palpable, and not subject to hesitation or doubt. Such is not this case; there is no cause shown to make it an exception from the application of the rule of practice we are commenting upon: on the contrary, if we were to reverse this case it would virtually destroy the rule of practice

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which has been so long enforced and been productive of so much benefit, for there is nothing in this case to distinguish it from another in which the plaintiff may have neglected to introduce all his proof in chief, upon the opening of his case. To reverse in this case would be to reverse in every case when upon a similar application the Judge should think proper to enforce the rule, and of consequence leave him no discretion whatever upon the subject, but make it imperative upon him to receive the proof. This we cannot think of doing.

The judgment of the Circuit Court will therefore be affirmed.

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CRUTCHFIELD vs. HAMMOCK.

1. Entries and grants are void and may be resisted in a trial in ejectment where there is a want of property in the grantor, or want of power in the officers appointed by the government to receive the entries and issue the grants.
2. The Surveyor of the Ocoee District included in his survey of the Ocoee District, land lying in the Hiwassee District, and so laid the same down in the general plan of the District. The lands were entered and granted as lands lying in the Ocoee District: Held, that the grants were void.

Ejectment in the Circuit Court of Meigs county, for 630 acres of land, and verdict and judgment for the defendant, Judge Keith presiding. The plaintiff appealed. The facts of the case, and charge of the court below, are set out in the opinion of this court.

*Jarnigan*, for plaintiff.

*Vandike*, for defendant.

TURLEY, J. delivered the opinion of the court.

This is an action of ejectment brought to recover possession of the premises in dispute, an island in the Tennessee river. The bill of exceptions shows that the lessor of the plaintiff

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claims title by virtue of entries made in the Ocoee District, and a grant thereon from the State of Tennessee; that the entries are Nos. 45, 44, 53, 154, and bear date 5th, 6th, and 12th of November, 1838, and the grant bears date the 31st, January, 1839; that the lands thus entered and granted, were ceded to the United States by treaty with the Cherokee nation of Indians in 1819, and formed a part of the Hiwassee District; that the lands forming the Ocoee District were ceded to the U. States by a treaty made with the same nation in 1835, and that the surveyor of the Ocoee District in making a survey and general plan for the district, included the island in dispute.

Upon the trial the Judge charged the jury, "that if the lands entered by the lessor of the plaintiff, and granted to him by the State did not constitute a part of the Ocoee District, as the same was established by law, the entries and grant communicated no title to him, and that he could not recover in this action;" and there was a verdict and judgment accordingly for the defendant.

The plaintiff in error does not controvert the fact, that the lands sued for were ceded by the treaty of 1819, and form a part of the Hiwassee District, and not of the Ocoee; but contends, that in as much as the surveyor of the Ocoee District has by his survey included the same in that district, and placed it down upon the general plan as a part thereof; that the defendant had the right to enter it in the office of said district, and that the State of Tennessee having issued a grant therefor, all persons are estopped from controverting the same.

This argument cannot be sustained. Ever since the case of *Polk's lessee vs. Wendell and others*, decided by the Supreme Court of the United States, and reported in the second Tennessee Reports, 433, it has been held that entries and grants are void, and may be resisted in a trial in ejectment, whenever there is want of property in the grantor, or want of power in the officers appointed by the government to receive the entries or issue the grants. The principles of this decision have been recognized by the Supreme Court of this State in the cases of *Fentress' lessee vs. Western*, decided at Charlotte in 1820, not reported, and in the case of *McLemore's lessee vs. Wright*, decided

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at Reynoldsburch in 1829, and reported in 2 Yerg. Rep. 326. In the case now under consideration, the lands in dispute constituting a part of the Hiwassee District, were not included by the lines of the Ocoee District; the surveyor, then, in extending the lines so as to embrace it, was acting out of the sphere of the authority vested in him, and his act was void; being void, the act cannot be construed to have made these lands a part of the Ocoee District; not being such, the entry taker had no power to receive entries therefor, as his power was limited to the reception of entries of land in the Ocoee District; he having no power to receive the entries, they are void; and of course a grant issued upon them by the Governor of the State is also void, because he has no power to issue grants, except upon valid entries. The lessor of the plaintiff, then, had no title to the premises in dispute, and the judgment of the Circuit Court must be affirmed.

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**MASSENGILL vs. BOYLES.**

1. A call for course and distance must yield to a call for natural objects.
2. Parol evidence is not admissible to control the description of land in a grant, unless monuments of boundary were made at the time of the execution of the grant.

This action of ejectment was instituted in the county of Grainger, by Massengill against Boyles, to recover a tract of land. It was tried by Judge Luckey, and a jury of Grainger, at the September term, 1842, of the Circuit Court, and resulted in a verdict and judgment for the defendant. The plaintiff appealed.

The facts of the case and charge of the Judge upon the points determined, are stated in the opinion of the court, which follows.

*R. J. McKinney*, for Massengill.

*Peck*, for Boyles.

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TURLEY, J. delivered the opinion of the court.

This is an action of ejectment, and the point to be decided now, arises out of the question, as to what is the true mode of running the first line of the grant under which the plaintiff in ejectment claims the premises in dispute. This grant was issued by the State of Tennessee, to the lessor of the plaintiff, on the 8th day of August, 1822, and calls to begin at a chesnut on the bank of Buffaloe creek, corner to Rhodes' big survey; then to run south seventeen degrees west along the line of said survey one hundred and thirty poles to a stake, on the bank of the Holston river, two poles below the mouth of Buffaloe creek, corner to Rhodes' big survey, &c. The grant to Rhodes was issued by the State of North Carolina, on the 29th day of July, 1793, and calls to lie on the north side of Holston river, on both sides of Buffaloe creek, beginning at three pines, and running different courses to a chesnut, on the north side of the creek; thence down the creek, a south course, one hundred poles to a beech, on the bank of the river, below the mouth of the creek, &c. The question for determination is, shall this line, from the chesnut be run straight to the point called for on the river, or shall it be run with the meanders of the creek? If with the meanders of the creek, the premises in dispute are included in the limits of the grant by the lessor of the plaintiff, otherwise not. As an abstract question, it would admit of no difficulty; for the call in the grant to Rhodes to run down the creek, it is believed, by all the judicial decisions, constitutes the creek the boundary, and the call in the grant to the plaintiff's lessor, "to run along the line of Rhodes" would make the creek the boundary on that line of the lands thus granted, notwithstanding the additional call of "south, seventeen degrees west," which would be rejected upon the well established principle, that a call for course and distance must yield to a call for natural objects.

But much proof has been introduced, tending to show that a straight line from the chesnut to the river has for years been considered, in the neighborhood, as the line of Massengill's grant, though the same has never been run and marked; and it



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is now contended, that the general reputation will control the call for the meanders of the creek, and make it yield to the call for course and distance, notwithstanding the line has not been marked. Upon this point, the court charged the jury, "that if the surveyor, at the time he made Massengill's survey, actually run the line from the chesnut straight to the point on the river, according to the call for course and distance, though he did not mark the same as the boundary, yet it would control the call for Rhodes' line, and make the line thus run, the boundary." Is this the law? We think not; and hold, that before a line run according to course and distance can control a call for natural objects, that it must not only have been traced by the compass, but must have been marked and fixed by the surveyor as the boundary, and which must be proven to be *the line* on the trial, and so are authorities. 1st Haywood, 22, 376; 2d Hawks R. 218; 3d do. 65; 2d Dervereaux Rep. 415; 3d Dev'r. 65, 67. These authorities fully sustain the position, that parol evidence is not admissible to control the description of the land in a deed or grant, unless monuments of boundary were made at the time of the execution of the deed or grant: this an unmarked line is not. The charge of the Judge upon this point, then, is erroneous, and the judgment must be reversed, and a new trial granted.

We do not deem it proper to enter into investigation of the merits of the defence arising out of the operation of the statute of limitations, as it could not benefit the defendant at this time, we being compelled to reverse upon the other point; the question is, therefore, left open for re-examination and adjudication in the Circuit Court.

Judgment reversed, and case remanded.

*HENRY et als. by next friend, vs. HOGAN et als.*

1. A settled rule in the construction of wills is, that the intention of the testator shall be carried into effect whenever it can be done without violating some established rule of law.
2. A clause in a will provided that the slaves of testator should be emancipated, and charged the real and personal estate of the testator with the expenses of emancipation and transportation of the slaves. The will, by a subsequent clause, devised all the real estate and the balance of his personal estate to certain devisees. Held, that these clauses of the will were not incompatible, but that the devisees took the real estate subject to the charge imposed on them by the previous clause.

This case was tried on bill, answer, replication and proof, in the Chancery Court at Greenville, by Chancellor Williams, and a decree for an account rendered, from which the defendants appealed.

*J. A. McKinney*, for complainants.

*R. McKinney*, for defendants.

TURLEY, J. delivered the opinion of the court.

This is a bill filed by the complainants against the executors of the last will and testament of William Conway, deceased, and the devisees of the real estate under the will, for an account for the proceeds of the land belonging to the estate of the said William Conway, from the date of his death, and the appropriation of the same to their benefit.

Complainants were the slaves of the said William Conway in his lifetime, but were by his will made and published on the 13th day of January, 1838, directed to be emancipated by his executors. It is obvious, from the whole context of the will, that the happiness and prosperity of his slaves was the chief object of anxiety with the testator. He says: "It has been my desire for the last twenty years, that at my death all my slaves should be liberated." "In accordance with my constant desire for the last twenty years, I will that at my death all the negroes then belonging to my estate shall be liberated; and inasmuch as the present laws of the State of Tennessee do not allow slaves liberated by their owners to remain within the limits of the

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State, I wish my executors to present my request in a petition to the legislature, that that honorable body may allow my slaves to remain in the State. If, however, the legislature of Tennessee should not grant the prayer of the petition, in that case it is my will that my executors should take such steps as may be found necessary to secure to my slaves their freedom in any one of the United States in which it can be done: the freedom of my slaves at my death, is the principal object of care and interest to my mind in the disposition of my property; and I desire that my executors shall use every means within their power, and do all things that may be necessary to secure that object. As from the existing laws of Tennessee upon the subject, some delay will take place before it can be ascertained whether my slaves can be allowed to remain in the State, I desire that the proceeds of my lands should be appropriated by my executors to their use and benefit, until their liberty is fully and completely secured to them in the State of Tennessee or any other State of the Union, where they may be allowed to enjoy it, or in any other country where it may be necessary for them to go in order to be free. If my slaves have to be removed temporarily or permanently out of the State, or even if they should have to be, or any of them desire to be transferred to Liberia, the expenses of such removal or transportation are to be paid out of my personal estate by my executors; and I desire that out of my personal estate a sum shall be appropriated by them to provide for the wants and support of my negroes until they can by their labor provide for themselves."

Having thus made ample provision for the emancipation of his slaves, and their sustenance and comfort until that event should be consummated, either in the United States or out, and having charged his estate, both real and personal, with the expenses necessary thereto, the testator, by a second clause in his will, devises all his real estate to the children of his nephew William C. Hogan and to W. Conway Hale. As was anticipated by the testator, insuperable difficulties arose to the emancipation of his slaves in the United States, and his executors found it necessary, in order to carry his intentions relative thereto into effect, to procure an order from the county court of Green,

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for their emancipation upon the condition of their removal to Liberia: this order was made at the — term, 1841, of said court, and bond entered into for the performance of the condition.

The point in dispute in this case arises out of the conflicting rights of the slaves and devisees under the will, the slaves claiming the proceeds of the real estate under the provisions of the will in their favor, and the devisees claiming the land under the devise in their favor, discharged from any liability for the use and benefit of the slaves from the date of the death of the testator.

A rule for the construction of wills of long standing, and one based upon principles of truth and justice, is, that the intention of the testator shall always be carried into effect, when it can be fairly ascertained, unless it be in violation of some established principle of law. That in the disposition of his property, the testator's chief object in the case under consideration, was the freedom and comfort of his negroes, is certain, for he says so: to defeat, then, any provision in his will made in their favor, would be to counteract the primary intention and object of the testator. This we cannot do, unless there be some principle of construction which forces such action upon us. This it is argued there is in this, that the clauses of the will appropriating the proceeds of the real estate to the use and benefit of the slaves until the period of their emancipation, and that devising the same to others in fee, are inconsistent and contradictory, and cannot therefore stand together, and that by all principles of construction the last must prevail over the first. This would certainly be true, if the two clauses of the will were inconsistent and contradictory; but we do not think they are, but that both clauses can be carried into effect without any contradiction and without defeating any expressed or implied intention of the testator. We think it certain, that the testator intended to charge his real estate to the full extent of its clear proceeds for the use and benefit of his slaves till they should be emancipated, anticipating delay in the completion of that event, and that the devise of the land in fee to others was with this charge upon it and that they take it *cum onere*, or in other words, that although the fee passes by the devise to the devisee under the

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will, yet they are not entitled to any proceeds of the land till the emancipation of the slaves, which event happened in 1842.

We therefore affirm the decree of the Chancery Court, and direct an account to be taken by the Clerk and Master of the Court, as is therein prescribed.

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HUNTER *et al* vs. FOSTER *et al*.

1. A deed which conveys personal property, consumable in the use, is void on its face against creditors, on the ground that it furnishes intrinsic evidence of an intention to hinder and delay them in the collection of their debts: a reservation, however, in favor of existing creditors repels all evidence of a fraudulent purpose, and renders such a deed valid.
2. The fact that a wife and child stand in silence by and hear the father and husband claim a part of personal property conveyed in a deed to them, and offer to sell it, cannot affect the validity of their title.

This bill was filed in the Chancery Court at Pikeville, by Martha Hunter, the wife of James Hunter, and her children Joseph and Martha, against the judgment creditors of said James Hunter, to restrain the sale of a slave. It was heard on bill, answer, replication and proof, before Chancellor Ridley. He dismissed the bill, and the complainants appealed.

*Thompson*, for complainants.

*Jarnagin*, for the defendants.

REESE, J. delivered the opinion of the court.

James A. Hunter, the husband of Martha and father of Joseph and Ann Hunter, several years ago, then resident in and a citizen of Virginia, by deed duly recorded in Albemarle county, conveyed certain articles of personal property, including a negro girl slave, to the complainants, therein expressly subjecting said property by a reservation on the face of said deed, to the satisfaction of all claims of any description on the part of their

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existing creditors. He afterwards, with his wife and children, and the negro girl and some articles of said property, removed to this State. He sold a wagon and certain other property, after his removal, which were embraced in said deed, without objection on the part of his wife, and spoke of and rented the property as his own. The defendants' Tennessee creditors, becoming such long subsequent to the date of the deed, procured the negro girl to be levied on, and were about to expose her to public sale. This bill was filed for an injunction to restrain the sale. The Chancellor dismissed the bill, and complainants have appealed to this court. We are not certain on what ground this was done. If it were because certain articles in their nature consumable in the use of them, were included in the deed, then it may be assumed that such circumstances render a deed void on the face of it against the creditors, on the ground that it furnishes pregnant and intrinsic evidence of a purpose to hinder and delay them in the collection of their debts; but the ample reservation of the rights of creditors, repels all such evidence of fraudulent purpose, and does not interpose the deed at all between the claims of the creditors and the liability of the property conveyed to satisfy them. If the decree dismissing the bill were founded upon the non-registration or improper registration of the deed in this State, then it may be assumed that the infant complainants came to this State as owners; and there is no law compelling infants, any more than other owners of slaves, to register their titles on immigration into the State. The act of 1831 does make such provision as to the ante-nuptial conveyance by way of marriage settlement, of the wife's slaves to a trustee: that is not this case, even as to the wife, and can have no effect whatever on the title of the children. If the decree were founded upon the proof of a sale of part of the property by James A. Hunter, without objection, and his claim of ownership to the balance, including the negro; then, it must be answered that the relation of husband, to one of the complainants, and of parent to the others, who were infant children, must, on all just grounds of reason and common sense, right feeling and domestic tranquillity, prevent the standing by in silence of the wife and child from rendering invalid, or injuriously

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affecting their claim or title. It becomes the creditor to be careful whom he trusts, and the purchaser to be careful from whom he buys, in all cases, and especially as to immigrants bringing with them slaves. He must be sure that he gives credit to, or buys from the owner.

If the decree proceeded upon the ground that the relation of husband and wife precluded all operation of the deed, as to transmission of title between them; the answer is, that if this be so, which it is not necessary here to enquire into or determine, still the deed would be effectual to transmit all his title to the children, the infant complainants.

Upon the whole, then, we are opinion that the relief prayed for in the bill, without meddling with the right between the complainants, should be granted: but, under all the circumstances, we think the parties should mutually pay the costs in the case.

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#### THE STATE vs. AUSTIN.

1. The case of *The State vs. Edwards* recognized and affirmed.
2. If a sheriff takes a recognizance and fails in his attestation to show the county of which he is sheriff, the recognizance is void.
3. Where the penalty on a recognizance is forfeited, the whole amount is recoverable or nothing; and, therefore, where the penalty was for too much, it was void.

This demurrer was argued before Judge Keith, and judgment rendered in favor of the defendant, from which the State, by the Attorney General, appealed.

*Attorney General*, for the State.

*Trewhitt*, for the defendants.

REESE, J. delivered the opinion of the court.

John Austin and Lewis Blanton became jointly bound in a recognizance bond, in the sum of one thousand dollars, for the

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appearance of one Samuel H. Tummons at the court house in Benton, before the Circuit Court of Polk county, on the second Monday in October, 1841, to answer the State on a charge of incest. The bond is signed and sealed, and has the following attestation, to wit, "Test, John Stamblin, Sheriff." A forfeiture was taken, a *scire facias* issued, and defendants demurred to the same. The demurrer was sustained by the Circuit Court, and the State has prosecuted an appeal in error to this court. One objection to this recognizance bond is the same with that held to be fatal in a case determined at the present term of this court, (*The State vs. Edwards*,) namely, that the sheriff does not show that he took the recognizance according to the power given to him by the act of 1809, ch. 6, because Tummons was his prisoner, surrendered by his former bail; or pursuant to the authority given to him by the act of 1831, ch. 4, because Tummons had been committed to jail for want of security. Nor does the bond show of what county Shamblin, who attested it as sheriff, was in fact sheriff; or under what circumstances, or by virtue of what authority, except that the party was charged with incest, he took the bond. Moreover, the crime is above the grade of petit larceny, and the bond is taken, as to the sureties, not in the sum of five hundred dollars, as required by the act of 1809 when the sheriff takes bail because of a surrender by former sureties, but jointly in the sum of one thousand dollars. It is argued, that a judgment for five hundred dollars could be given upon the bond against the defendant: but this cannot be. It is not like the case of a sheriff's bond where the penalty is intended to enforce a smaller pecuniary liability, and where the actual sum due, and not the penalty, is recovered. Here the whole penalty is forfeited, and recoverable by the State, or nothing.

For these several reasons the demurrer must be sustained and the judgment of the Circuit Court be affirmed.



*TORBET'S heirs vs. McREYNOLDS et al. admr's.*

1. Where an administrator cognizant of the facts failed to bring suit for the recovery of a slave, till the right was barred by the statute of limitations; held, that he was responsible for the value of the slave, with interest on such value, but not chargeable with compound interest.
2. The court may charge a trustee with compound interest, who has been guilty of fraud or such gross negligence as to amount to fraud, or where he has funds in his hands and profited by them, and failed to make a frank disclosure; but a mere failure to sue, does not make out a case which comes within the rule.
3. McReynolds, Duncan and Blair were administrators of Torbet, deceased, and the co-administrator Blair having died, a bill was filed against McReynolds, Duncan and the administrators of Blair. The bill was dismissed as to Blair's administrators, and the distributees recovered judgment against Duncan and McReynolds for all costs. Held, that Duncan and McReynolds were not liable for the costs of the co-administrator Blair. His administrators should recover no costs.

This bill was filed in the Chancery Court at Madisonville, by the distributees of Torbet, against Duncan and McReynolds, the administrators of Torbet, and against the administrators of Blair, deceased, who was co-executor of Torbet with Duncan and McReynolds. It was filed for an account; and a decree was rendered in favor of complainants, on a hearing on bill, answers, replications and proof, before Chancellor Williams; from which the defendants appealed.

*Hynds*, for complainants.

*Cannon*, for defendants.

REESE, J. delivered the opinion of the court.

This bill was filed for a general account of the administration of James Torbet, deceased, but in its progress became narrowed down to a claim for the value of the hire of a negro girl slave, named Cynthia, from 1828, the time of the death of James Torbet, till 1840, the time of the death of one Margaret Hall, upon whose death the negro became, by limitation in a deed set out in the record, the property of one John Hall. The claim of the complainants is based upon this, that on the inter-marriage of James Torbet with the daughter of one James Hall,

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the owner of the said girl for the life of his wife Margaret, the said Hall made a parol gift of this girl to Torbet and wife, and placed her in their possession, where she remained till the death of Torbet, being a period of five or six years. After Torbet's death, James Hall took this negro girl and Torbet's children to his house, reserved his claim of the negro girl, and the administrators of Torbet permitted the negro to continue in the possession of Hall, claiming her as his own, till by operation of the statute of limitations, the title became vested in him exclusively. The loss arising from their neglect to bring suit, is a loss of their own, as complainants insist, and they seek an account on that ground. The fact of a parol gift and delivery of possession to Torbat and wife is, we think, well established by the testimony. This was before the act of 1831, and therefore at a time when such gift, accompanied by possession, was valid. This being the state of the fact, we deem it equally clear, that nothing has been shown in the case which in point of law will throw off from the defendants the responsibility of accounting for the value of the property. It was, to be sure, a family transaction, and the property would ultimately belong in remainder to John Hall. Still, their title was good for the life of Mrs. Margaret Hall and it was their duty to look after that. No doubt there was an entire absence of fraud and of all *mala fides*, but not of all neglect in the transaction. For this neglect, they were held by the Chancellor to be responsible: but under all the circumstances of the case, the honorable Chancellor, we are satisfied, adopted a principle of accountability somewhat too stern and rigid, namely, that the annual value and the interest thereon should be computed together from year to year. The defendants are not guardians, and there is no law prescribing this mode of computation. The Court of Chancery may adopt it, in cases of fraud on the part of the trustee, or *crassa negligentia* amounting thereto, or where he has had funds in his hands and probably profited by them, or has failed to make a frank disclosure. In these cases, and in cases of like description, this mode of computing the interest may be proper: but not in a case bearing the aspect and attended by the circum-

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stances of that before us in the record. To make the party account for the full value, with interest, is a measure of justice sufficiently stern, without subjecting him to compound interest. Let that be corrected.

There is, also, on the face of the final decree, a mistake against the defendants of ninety dollars and ten cents. The decree on the face of it shows that it was the purpose and object of the Chancellor to make the defendants liable for the hire during the life only of Mrs. Margaret Hall. That, with interest computed as above, to March, 1843, amounted to five hundred and ninety-nine dollars and eighteen cents. But the clerk, as he was ordered, computed the value of the hire after the death of Margaret Hall and while she was in possession of John Hall's family, from May, 1840, to March, 1843, which, with interest, amounted to ninety dollars. To show a general aggregate, this was added to the other, making six hundred and eighty-nine dollars and twenty-eight cents; and this sum the court took by mistake as the basis of defendants' liability, although the decree declares that John Hall, being owner, was not liable for any thing. This must be corrected; and the defendants must not be held liable for the costs of the administrators of Blair, who was co-administrator of Torbet. They should recover no costs. The defendants will pay the balance of the costs in the Chancery Court, and the one half the costs in this court. The other half must be paid by the complainant and Blair's costs in the first action.

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1. Defendant produced a plat of survey, and asked a witness if he did not make it, to which he replied, he did: Held, that it was proper to permit the witness to examine the plat so as to refresh his memory as to the period he made it, and whether for plaintiff or defendant; but if he did not know when, or at whose instance it was made, it was not evidence.
2. In order that the possession of one claimant shall neutralize the possession of another both must be in the actual possession of some part of the disputed land.
3. If defendant had actual adverse possession of part of a hundred acre tract when it was sold by Glass, he was in adverse possession of the entire tract, and the sale of Glass would be champertous and void as to the whole tract.
4. A mere theoretical error of the court, which could not have affected the verdict of the jury, is not good ground of reversal.

Churchman instituted this action of ejectment in the Circuit Court of Jefferson county against Mitchell, and it was submitted on the plea of not guilty to a jury, Robert M. Anderson, Judge, presiding, and a verdict was rendered in favor of the plaintiff, and defendant appealed.

*Peck*, for Mitchell.

*Cocke*, for Churchman.

GREEN, J. delivered the opinion of the court.

On the trial of this cause, the plaintiff introduced and examined John Coppack as a witness, as to the boundary of the land in controversy; and on the cross examination the defendant produced a plat, and enquired of the witness whether he had not made that plat as the land had been run out by him; he answered he had made it; it was all in his hand writing, but he could not tell when he had made it. The defendant offered to submit the plat to the jury as evidence, but the court rejected it, but permitted the witness to refresh his memory by an inspection of the plat and notes, to which the defendant excepted, and which his counsel now insists was error.

We are unable to perceive how this plat could be evidence in the cause. Its production and identification by the witness as his work, is evidence that he had, at some time, and for some purpose, surveyed the land it represented, and it was

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competent for him to use it, to refresh his memory, so as to ascertain whether it had been made at the instance of the lessor of the plaintiff, or those under whom he claimed. This was permitted by the court; but when the witness could tell no more about it, than it was his work, and the notes were in his handwriting, the court was certainly right in saying that the plat, as such, was incompetent to go to the jury as evidence. It could certainly prove nothing between these parties, because it does not appear to have been made at the instance of either of them. It was evidence only, that Coppack had, at some time, and for some unexplained purpose, made a survey that had left out the land granted to Howerton; but as it did not show at whose instance the survey was made so as to connect it in any way with the parties in the cause, it was not evidence of any fact in this case, and was, therefore, properly rejected, as irrelevant and incompetent.

2. The court charged the jury, that if the plaintiff had possession of any part of the land covered by his grant or deed, the defendant would be protected to the extent of his actual possession only; the meaning of which, as applicable to this case is, that if a plaintiff have a grant for a large tract, a part of which is covered by the defendant's title, who is in actual possession of such part for seven years, he will be protected to the extent of his actual possession only, if the plaintiff have possession of any part of his tract so interfered with.

In this part of the charge, his Honor the Circuit Judge was certainly mistaken. The law is, that in order that the possession of one claimant shall neutralize the possession of the other, both must be in the actual possession of some part of the disputed land.

But as this error of the court could have had no influence on the minds of the jury, it would be improper to reverse the judgment on account of it. If the jury had been of opinion, that the defendant had been seven years in possession of the land, and had, by their verdict, protected that possession to the extent of his actual occupation or enclosures only, then the wrong direction of the court, as to the extent of his adverse possession, would have affected the verdict, and would have been a good

[*Mitchell vs. Churchman's Lessee.*]

ground for reversal. But the jury find for the plaintiff as to the whole extent of the claim, and as the defendant's possession did not protect him as to any part of the land, it is certainly useless to enquire as to the extent of that possession. The court also erred in telling the jury, that if the defendant had actual adverse possession, at the time Glass sold the land, the sale would be champertous and void to the extent of such actual possession only. If the defendant had actual adverse possession of a part of his hundred acre tract, he was in the adverse possession of the whole of that tract, although said tract was covered by Glass' grant, and he was in possession of part of the land covered by his grant, not included in the defendant's hundred acre grant. A sale, therefore, under such circumstances, would be void to the whole extent of the defendant's grant, so adversely possessed.

But this, also, was a mere theoretic error, that did not at all effect the verdict. The jury did not find that the sale was champertous and void to any extent; and it were certainly a very useless thing to reverse the judgment, with a view to enquire in another trial, to what extent the sale would have been void, had it been invalid for any part.

This is one of those cases in which this court can see, that the errors of the court below could not possibly have had any influence upon the verdict; and that if the charge of the Judge had been unexceptionable, the jury would have found the same verdict. In such cases a new trial will not be granted by this court. The effect of a reversal would be, to create additional costs, put the parties to great expense and trouble, and occupy the time of the court below, in another trial, merely to correct theoretic errors, that it was known exerted no practical influence on the issue of the cause. *Graham on New Trials*, 301, et seq.; 8 Wend. Rep. 672; 3 Jh. Ca. 125.

The judgment must be affirmed.

GOODWIN *vs.* MOORE.

Smith bequeathed a life estate in slaves to his wife Catharine, and the remainder to his daughter Nancy and died. Heaton married Nancy and died, leaving his wife Nancy and her mother, Catharine, surviving. Nancy intermarried with Moorely, and thereafter Catharine died, and then Moorely: Held, that the slaves belonged to the representatives of Moorely. And though Catharine may have, by gift, surrendered her life estate to Heaton, such gift, no more than a sale under similar circumstances, would extinguish the wife's right of survivorship.

This bill was filed in the Chancery Court at Jonesborough by Goodwin, administrator of Moorely, against Moore, administrator of Heaton. Moore filed his cross bill. Answers and replications were filed, proof taken and the cases heard before Chancellor Williams. He dismissed the cross bill and gave a decree on the original bill. The administrator of Heaton appealed from the decree dismissing the cross bill.

*J. A. McKinney*, for Goodwin.

*T. Nelson*, for Moore.

REBSE, J. delivered the opinion of the court.

A certain Edward Smith died in Carter county, in the year 1809. In 1807 he made and published his last will and testament, in which, among other things, he devised as follows, to wit; "I give and bequeath to my dearly beloved wife, Catharine, all my stock of horses, cows, hogs, sheep and bees, with all my household furniture and farming utensils of every kind; also my wagon and gear, still and vessels; also my plantation whereon I now live, for and during her natural life; also my negro woman Agness and her child, and their increase for and during her natural life, and then to go to my youngest daughter, Nancy, and her heirs forever." In 1808, the said Smith made the following instrument, to wit; "To all whom it may concern, know ye, that I Edward Smith of the county of Carter and State of Tennessee, for and in consideration of the love towards my loving wife, Catharine Smith of the same county and State aforesaid, have given, and by these presents do finally give and grant unto the said Catharine Smith, a negro woman named

[Goodwin vs. Moore.]

Agness, and one child named Nelly, and their increase for and during her natural life, and then to go to my youngest daughter, Nancy, and her heirs forever. Before signing these presents, I have delivered the said negroes with my own hands to my wife Catharine, to dispose of to my daughter Nancy whenever she thinks proper, bearing even date, to have and to hold the said negroes to her, Catharine Smith, and my daughter Nancy and her heirs forever, from henceforth, as her and their proper negroes absolutely, without any manner of condition." In 1819, Nancy Smith intermarried with Vaught Heaton: in 1829 Vaught Heaton died, his wife, Nancy, and his mother-in-law, Catharine Smith, surviving. A year or two afterwards Catharine Smith died, and her daughter Nancy, the widow of Heaton, subsequently intermarried with James B. Moorely: he has departed this life, leaving one child of that marriage and his wife, and also leaving several other children of a former marriage surviving. His administrator filed a bill against his widow and McGween, to recover certain negroes, descendants of Agness and Nelly, in the will and deed mentioned. And the complainant, the administrator of Vaught Heaton, filed his cross bill, alleging that Catharine Smith, in her life time, surrendered her life estate to Heaton, in consequence of which the entire property in the negroes vested absolutely in Heaton, freed from his wife's right of survivorship in the title or estate in remainder. His Honor the Chancellor gave the relief prayed in the original bill, and the bill above referred to, he dismissed. From this latter decree alone an appeal has been taken. Voluminous as is the record in pleadings and proof, and elaborate as has been the discussion in this case, there is no material question which has not already been decided by this court in the case *Caplinger vs. Sullivan*, 2 Hump. 548, and *Perry and Patterson vs. Gill*, 2 Hump. 218. We think no question as to the effect of a revocation of the bequest of the will, by operation of the deed can arise in this case, because the cross bill, as well as the original bill, expressly alleges, that the object and intention of the deed was effectually to carry out the bequest of the will. But if such a question could arise, then, we think it is clear that the interest of Catharine Smith under the will, and that intended to



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be given to her by the deed being identical, and she shown, in both instances, to be the favored object of Edward Smith's bounty, the ineffectual provision of the deed cannot operate to revoke the bequest to her for life in the will; thus defeating the leading purpose of Edward Smith in both instruments, so as to let in Nancy Smith to a present interest under the deed, in the absence of any will, which we much doubt, and are not called on in this case to determine. Whether the daughter, therefore, claims by the will, or can be held to claim any thing by the deed, in either case, her interest is a remainder only, not commencing in enjoyment till the death of the mother. The surrender of the life estate by the mother, if it took place, to Heaton, the son-in-law, would not merge and incorporate that interest with the remainder belonging to the wife, so as to invest the husband presently with that future interest, and defeat the right of survivorship in the wife, if the husband should die before the termination of the life estate, and this for the reasons stated by the court in the case of *Caplinger* above referred to. The gift of the life estate to the husband, can, we think, have no greater effect than would the sale of it. These negroes, then, remained to the wife, on the happening of the death of her mother after that of her husband, and of course became the property of the second husband on his marriage with her, and he being dead, they must go to his representatives; so we must affirm the decree and dismiss the bill.

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MORROW vs. BLEVINS.

The treaty of New Echota providing for the removal of the Cherokees west of the Mississippi river did not dissolve them as a nation east of the Mississippi, nor did it abrogate or suspend the force and operation of the laws of the General Government regulating the intercourse with the said Cherokees. These laws continued in force and operation for and during the term of two years; that being the time within which their removal was to be effected.

Blevins brought this action of trespass against Morrow in the Circuit Court of Bradley county, and declared for a trespass in the seizure and destruction of two barrels of whiskey and a keg

[Morrow vs. Blevins.]

of brandy. The defendant pleaded not guilty, and a special plea, which set forth, that the defendant was the captain of a company of volunteers in the service of the United States under Gen. Wool, an officer appointed by the President of the United States, under the constitution and laws of the United States, to command the forces stationed in the bounds of the Cherokee nation of Indians east of the Mississippi river, and that the laws of the United States prohibited the introduction and sale of spirituous liquors to the Indians, and that the plaintiff had brought into the bounds of the Cherokee nation east of Mississippi, the spirituous liquors, for the destruction of which he was sued, to vend to the Indians, and that he was notified to remove them and refused so to do, and that thereupon it was seized, the barrels broken and the liquor poured out and lost, and this was done by command of Gen. Wool, so in command as aforesaid. The plaintiff demurred to this plea. The demurrer was sustained, and the case was tried before Judge Keith and a jury of Bradley county, at the May term, 1838, and a verdict and judgment were rendered in favor of the plaintiff for the sum of \$100, from which judgment the defendant appealed.

*S. Jarnigan*, for plaintiff in error.

*T. J. Campbell*, for defendant in error.

REESE, J. delivered the opinion of the court.

Blevins sued Morrow for the seizure and destruction of two barrels of whiskey and a keg of brandy. Morrow pleaded the general issue, and, also, that at the time of the alledged trespass he was an officer of the United States army, in the Cherokee nation of Indians, under the command of Brig. Gen. Wool, to whom the President of the United States had assigned the command of the public forces in that nation; that the plaintiff, in violation of the laws of the United States, had brought said whiskey and brandy within the limits of the Cherokee nation of Indians, and was employed in vending and retailing the same to the Indian population without license or permission; and that

[Morrow vs. Blivins.]

the defendant, acting under the orders of Gen. Wool and in obedience to his command, seized and destroyed the said spirituous liquors, &c. This plea was demurred to, and the demurrer sustained by the Circuit Court. And the only question here is, whether the judgment of the Circuit Court, in that respect, be correct. It has not been denied in argument that the act imputed to the defendant was fully justified by the provisions of the act of Congress of 1802, called the intercourse act, the act of Congress, of July 1832, and especially by those of the act of Congress of June 1834. Nor has the power and constitutional competency of Congress to enact such laws been at all called in question, as, indeed, it could not be, successfully; the power being not only expressly conferred, but being in its nature exclusive, and, therefore, in any conflict with State legislation, entitled to supremacy and control. Nor has it been contended, in argument, that the attempt by the legislature of Tennessee, in 1833, to subject individual Cherokees within the limits of Tennessee to criminal responsibility for certain specified offences, or the case of *Forman vs. The State*, arising therefrom, can have any legitimate influence and operation upon the determination of the question in this record. The only argument by which it has been attempted here to maintain the judgment of the Circuit Court is, that prior to the alledged act of trespass, the treaty of New Echota, of December 1835, and 1836, had been made and ratified; that upon the ratification of that treaty the Cherokees ceased to exist as a nation east of the Mississippi, and the laws of the United States to regulate commerce and intercourse with them, ceased to have any relation or application to the tribe within the limits of Tennessee. On the other side this effect is utterly denied to that treaty. The transaction in question happened within two years of the formation of the treaty. The 16th article of the treaty contains a stipulation, that the Cherokees shall remove to their new homes within two years from the ratification of the treaty; and that during such time the United States shall protect and defend them in their possessions and property, and free use and occupation of the same. Certainly there is nothing in the fact of the ratification of this treaty, or in the situation of the Cherokees

[The State vs. Edwards.]

during the two years before removal, to abrogate or suspend those laws of Congress to which we have referred, intended to protect the safety, to guard the morals, and to secure the peace of the Indians. On the contrary, the new circumstances in which they were placed by the treaty, and the new relations to the white citizens likely to grow out of it, in the process of removal, made the existence and enforcement of these intercourse laws, and police regulations of the United States more necessary than ever to their peace and safety. The Indians did not lose their character of tribe or nation, and become a mass of unorganized individuals *eo instanti*, upon the ratification of the treaty. Their organization during the two years was just the same as before, and the intercourse laws of the United States were unaffected and unimpaired by the condition of things after the treaty.

We are of opinion, therefore, that the plea is good, and that the demurrer to it should have been overruled; and we give judgment accordingly.

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#### THE STATE vs. EDWARDS.

1. A sheriff can take bail only in the cases mentioned in the statutes; 1st. Where the party has been surrendered by his bail; and, 2d. Where he has been committed for want of surety. The recognizance must, therefore, recite on its face the facts upon which the authority to take the bail is based.
2. A deputy sheriff has no power to take bail in either of the above cases.
3. The legislature have no power to extend the obligation of bail to a more remote day from that mentioned in the recognizance.
4. The sickness of a defendant constitutes no reason for his non-appearance in obedience to the recognizance; that will excuse the bail from the surrender of the principal at a subsequent term.

*Attorney General*, for the State.

*Trewhit*, for the defendant.

GREEN, J. delivered the opinion of the court.

This is a *scire facias* against the defendant, as surety upon a

[The State vs. Edwards]

forfeited recognizance. The defendant pleaded, first, that he had surrendered the principal to the sheriff. To this plea there is a general replication and issue. The second plea alleges, that the principal, for whose appearance the defendant was surety, was sick during the whole term of the court, at which he was bound to appear. To this plea there is a general replication; to which the defendant demurred. The third plea alleges, that the principal, for whose appearance the defendant was surety, has been tried, convicted and punished for the offence with which he was charged. To this plea the State demurred.

The court gave judgment for the defendant, on his demurrer to the plaintiff's replication to the second plea, from which the State appealed to this court. The demurrer to the replication to the second plea was well taken, because there was no proper conclusion. The substance of the replication amounts only to a denial of the fact stated in the plea, that the defendant in the indictment was sick during the whole term of the court at which he was bound to appear, and should, therefore, have concluded to the country. But the plea itself is bad. The fact that a defendant is sick, constitutes no reason for his non-appearance in obedience to his recognizance, that will excuse the bail from a surrender of him at the subsequent term.

This however leads us to examine the *scire facias*; for the demurrer goes back to the first fault in pleading. And we think it is bad for several reasons.

1st. By the act of 1809, ch. 6, sec. 2, the sheriff is authorized to take bail, in cases where the principal may be surrendered by his sureties. By the act of 1831, ch. 4, sec. 1, the sheriff is authorized to take bail in all criminal cases, where the accused has been committed to jail for want of surety. Car. & Nich. 119, 121. These are the only statutes which authorize the sheriff to take bail in criminal cases. His authority is not general, but special. He can only take bail in the given cases mentioned in these statutes: where the party has been surrendered by his bail; and where he has been committed for want of surety. He must, therefore, recite in the recognizance, the state of facts, upon the existence of which, his authority to

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take the bail is founded, otherwise the court cannot see that the recognizance was entered into before an officer, having by law power to take it.

2d. This recognizance was taken before the deputy sheriff. We do not think the deputy sheriff has any power to take a recognizance under the statutes before referred to. The act thus authorized, is of a judicial character. It requires the exercise of judgment and discretion; and the sheriff alone is empowered to perform it. The case would be different, if it were purely a ministerial act. In all such cases the sheriff may act by his deputy. But it is insisted by the Attorney General, that this is a ministerial act; that the sheriff at common law, could, as an incident to his office, take bail in criminal cases.

Whether this be so or not, it is not necessary to enquire, for whatever the common law powers of a sheriff might be, it is clear that the Acts of Assembly above quoted restrict them to the cases mentioned in the acts, and by implication, repeal all other powers upon the subject, not therein conferred.

3d. But the recognizance recited in this *scire facias*, required the party to appear at the court the 4th Monday of October, 1840. The forfeiture is taken at a court commenced to be holden the 4th Monday of February, 1841; the record reciting that there was no court holden on the 4th Monday of October, 1840. Most clearly the defendant was not bound beyond the undertaking in his bond, and the law applicable to it, as it existed at the time the bond was executed. It does not appear for what reason no court was held in October, 1840; but if we may know that the time was changed by a legislative act, still the legislature had no power to extend the terms of the defendant's contract, beyond the obligation he entered into when he made the contract.

Let the judgment be affirmed.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF TENNESSEE.**

~~~~~  
NASHVILLE, DECEMBER TERM, 1843.  
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**McAULY vs. LOCKHART.**

The fact, that a party may from looking at the docket conclude that his suit will not come on at a given time, and it does come on sooner than was expected, in consequence of which the cause is tried in the absence of material witnesses, furnishes no ground for setting aside the verdict and granting a new trial.

This action of assumpsit was tried before Maney, Judge, and a jury of Sumner county, on the plea of non-assumpsit, and resulted in a verdict for the plaintiff, Lockhart. McAuly, on affidavit filed, moved the court for a new trial, which was overruled and judgment rendered for the plaintiff. The defendant appealed.

*Guild and White*, for plaintiff in error.

*Meigs*, for defendant in error.

GREEN, J. delivered the opinion of the court.

This is a suit for services rendered the intestate of the plaintiff in error, (an aged lady,) as a nurse during her last illness. The defendant in error (who was plaintiff below) proved on

[McAuly vs. Lockhart.]

the trial, by the attending physician, that the intestate of the defendant below was sick, and confined for a period of two months before she died; that he visited her very frequently before she died, sometimes twice a day, and sometimes in the night; that there was no white person in attendance on her except the plaintiff, who was always found there with her; there were a sufficient number of servants about the house; witness frequently left medicines with a prescription for Ann McAuly, which plaintiff administered.

The jury found a verdict for the plaintiff for ninety-five dollars and seventy-five cents. The defendant moved for a new trial, and read his affidavit, which states that he did not expect, from the situation of the docket, that the case would come on for trial the day it was called; but he had sent his brother to the court-house several times during the day to see about it; that he can prove on another trial by Ann Murrah, that the plaintiff is not entitled to recover any thing; that said witness had been summoned, and lived in town, but was not in the court-house when the cause was called; and that she has several children, and it would have been inconvenient for her to have remained in the court-house; that when the cause was called, an officer was dispatched immediately for the witness, but before she arrived the plaintiff had concluded her evidence and the argument of the cause had commenced. The affidavit of Ann Murrah was also read, in which she states, that she frequently visited Ann McAuly during her illness; that she always found Caroline Lockhart there; but that she was at her own work, making dresses; that she never saw her do any thing for Ann McAuly, except to call a servant; that there were plenty of servants, and that Caroline Lockhart's services were not needed, and that she heard Ann McAuly tell Caroline Lockhart that she did not want her. The court refused a new trial, and the defendant appealed to this court.

We think there is no error in this record. It is not pretended that the court erred in the trial; but it is insisted that the defendant has given a good excuse why his witness was absent, and that if her testimony had been before the jury, they would have found differently.



[Chaffin vs. Williams.]

In the first place, we do not think the excuse for the absence of the witness is sufficient. The fact that a party may form the opinion, from looking at the docket, that his cause will not come on a particular day, and consequently make no preparation for the trial, is certainly no reason for setting aside a verdict. The inconvenience of the attendance of the witness, does not appear to have been greater than every other witness, who has duties at home, experiences. There is, therefore, no sufficient reason why the witness was not present.

2. But if this evidence had been heard, it ought not to have altered the verdict. The intestate of the defendant was an aged lady, ill and confined for two months, under medical treatment, and there was no white person to wait on her, or administer medicines, except the plaintiff. It is true there were servants, but they could not be trusted to give the medicines; could not read the prescriptions of the physician, and were every way unfit to wait upon a sick lady without the presence and direction of some white person.

Let the judgment be affirmed.

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#### CHAFFIN vs. WILLIAMS.

Williams and McLaughlin were jointly entitled to recover cost from Chaffin, who was the surety for the prosecution of a suit against them which had failed. A *scire facias* was issued, showing a joint right of recovery, but the verdict and judgment rendered on the *sci. fa.* were in favor of Williams alone: Held, that the judgment should have been arrested on the motion of defendant.

This is an appeal in error from the judgment of the Circuit Court of Lawrence county, in favor of plaintiff against prosecution bail, on a *scire facias*. The defendant appealed.

*Houston*, for the plaintiff in error.

*N. S. Brown*, for the defendant in error.

REESE, J. delivered the opinion of the court.

Chaffin, the plaintiff in error, was the prosecution bail of

[Chaffin vs. Williams.]

one James Williams, in a suit by him brought against Thomas Williams and Thomas McLaughlin. James Williams failed successfully to prosecute his suit, and the defendants Thomas Williams and Thomas McLaughlin recovered of him their costs. Executions issued in their favor against James Williams, but all the costs were not collected. This *scire facias* was sued out to subject the prosecution bail, and obtain satisfaction from them. The *sci. fa.* sets forth the writ and prosecution bond, the verdict, judgment and execution in the name of Williams and McLaughlin vs. Williams, and then concludes the writ by directing the sheriff to make known to the plaintiff in error, Chaffin, that "he appear and show cause, why there should not be a judgment against him in favor of Thomas Williams," omitting Thomas McLaughlin's name. Pleas in short were filed to the *sci. fa.* of payment, accord, and satisfaction, and a former levy on personal property sufficient to pay the costs recovered. These pleas do not state the parties. All the subsequent proceedings are in the name of Thomas Williams vs. Chaffin. The verdict of the jury was found in favor of Thomas Williams vs. Chaffin. And the Circuit Court after overruling reasons in arrest of judgment, gave judgment in favor of Williams vs. Chaffin, and awarded the issuance of execution. We entertain no doubt that the Circuit Court erred, in not sustaining the reasons in arrest of judgment. Williams and McLaughlin were jointly entitled to recover the costs from the prosecution bail. The *sci. fa.* shows the joint interest, but all the proceedings subsequent to the issuance of the *sci. fa.* are in the name of one. For this reason, the judgment of the court awarding execution should have been, and now must be arrested.

Let the judgment of the Circuit Court be reversed.

*ENSLEY et als. vs. BALENTINE et als.*

1. When a man buys land in the name of another and pays the consideration money and interest, the land will be held by the grantee in trust for the person who pays the consideration money.
2. A father seized property under a claim of right which belonged to his son-in-law, sold it, and vested the proceeds in land: would a trust result in favor of the true owner? This may well be questioned.

Enoch Ensley and others became the sureties of Jesse Balentine, a constable, for the discharge of his duties as such. Balentine appropriated large sums of money collected by him as constable, which his sureties were compelled to pay. In part discharge of their claim, Balentine conveyed to them a tract of land lying in Davidson county. The title was in the name of Charles Balentine, his father-in-law. This bill was filed by the complainants, in the Chancery Court at Franklin, against Charles and Jesse Balentine, alledging that Jesse Balentine was the owner of a slave; that Charles Balentine took possession of the slave, sold her, and vested the proceeds in land for the benefit of his son-in-law, taking the title thereto in his own name, and praying that the trust might be set up and title decreed to complainants.

The answer denied that the slave belonged to Jesse Balentine, or that the land was purchased for Jesse Balentine or with his money. A replication was filed and proof taken, which so far as is necessary to be exhibited is set forth in the opinion of the court.

It was heard before Chancellor Bramlitt at the May term, 1843, on bill, answer, replication and proof; and he regarding the proof insufficient to establish a resulting trust, and also that the deed by Jesse Balentine would operate as a cloud on the title of Charles Balentine, ordered that the bill be dismissed and the deed of Jesse Balentine to complainants be cancelled.

The complainants appealed.

*E. Ewing*, for Ensley et als.

*Washington and Read*, for defendants.

[Ensley et als. vs. Balentine et als.]

GREEN, J. delivered the opinion of the court.

This bill is filed to set up a resulting trust. It is alledged, that Jesse Balentine was the owner of a negro girl, Emeline; that the defendant Charles Balentine (who was his father-in-law) took this girl into his possession and sold her, and vested the proceeds in the tract of land in question, taking the title in his own name. Jesse Balentine conveyed the land to complainants. The answer denies that the land was purchased for Jesse Balentine, or that it was paid for with his money. The doctrine, that when a man buys land in the name of another and pays the consideration money, the land will be held by the grantee in trust for the person who pays the consideration money, is too firmly established now to be questioned. 2 Story's Eq. Juris. s. 1201.

If, therefore, it were to appear from the proof in this cause, that the money of Jesse Balentine was paid for this land, it would belong to him in equity, notwithstanding the title was taken to Charles Balentine. It is insisted for the complainant, that Kimbro and Currin prove that Jesse Balentine's money was paid for the land. Mr. Kimbro says, that he was asking Charles Balentine in relation to the circumstances of Jesse, who was indebted to him: "He said that he was now in a better situation than he had been; that he had given him a negro girl; and finding him insolvent and in debt, he had taken the girl and had sold her, and purchased a piece of land for him and taken the title in his own name. He thought that Jesse Balentine was in a better situation to pay his debts, because he could work the land and make something to pay his debts."

Mr. Currin says that he had a conversation with Charles Balentine in 1832, when he said he had given Jesse Balentine a girl, and that he had sold the girl, and from the sale had paid himself seventy odd dollars, "and with the balance of the money he intended to purchase a place as a home for Lydia (Jesse Balentine's wife) and her children."

Witness sold the land to Mr. Charles Balentine and made the title to him, and he gave his notes for the money. This is all the evidence in relation to the payment for the land.

[Easley et alr. vs. Balentine et als.]

When the defendant conversed with Mr. Currin, the land had not been purchased, although he had before that time sold the negro. He said he *intended* to purchase a place for Lydia and her children. The purchase *was* made and *notes* were given for the money. This evidence does not tend to prove that the notes which were given for the land, were discharged by the payment of the money he had received for Emeline. Indeed it rather proves the contrary, for as the negro had been sold and the money received before the purchase of the land, if he had intended to pay *that* money for the land, it would have been most natural for him to have paid it down at the time of the purchase.

The fact that he gave his notes for the purchase money of the land, is evidence that he applied the money which had been received for the negro to some other use.

He would hardly have kept it by him to discharge the notes, when it would have been so much more natural to have paid it in the first instance. As to Kimbro's evidence, he only says that the defendant stated he had sold Jesse's negro girl and had purchased a piece of land for him. He does not say he had purchased the land with the money for which he had sold the girl. And although we might infer this to be his meaning from this deposition alone; yet, when coupled with Currin's deposition, from which it appears that the girl had been sold and the money received before the land was purchased, and that he gave his notes for the land, we are not permitted to extend the meaning of Kimbro's deposition beyond the plain sense of the language.

But if the money of Jesse Balentine was not paid for the land, no resulting trust can be raised in his favor, although Charles Balentine may have been his debtor, and may have intended the land for him in discharge of that debt, for (as has been said) that would be in the teeth of the statute of frauds. 2 Story's Eq. Juris. s. 1201; Bartlett & Pickergill; 1 Eden's R. 22, 24.

The negro had belonged to Charles Balentine, and had been put in possession of his daughter in 1830, when she was married. There is proof from members of the family, that he had

[Easley et al. vs. Balentine et al.]

never regarded this as a gift of the girl to Jesse, having always intended her for the use of his daughter and her children.

One witness, R. H. Hite, states that the old man said the girl was sent for the accommodation of his daughter. The witness also states, the old man hired the girl to Jesse two or three years and took his notes for the hire.

Now, although the defendant said to Mr. Currin, that he intended the girl for Jesse, and thought she would be liable for his debts, yet it is evident that he took her away under a claim of right in himself. In selling her, he did not act for *Jesse*, but for himself; and he intended to make a provision for his daughter, which he regarded as more suitable.

Although the court may think, with defendant, that the girl would have been liable for Jesse's debts, yet this view of his feelings and opinions goes to show that he would use the money he received for the girl as his own, and pay for the land from his own funds when the notes fell due.

It may also be well questioned, whether if a father, or other person, take into his possession the property of another acting under a claim of right in himself, and sell such property, vesting the proceeds in land, a trust would result in favor of the true owner of the property so taken.

The taking would be a conversion, and the money arising from the sale of such property would belong to the wrong doer, and he would be answerable in damages to the true owner. Upon the whole, here is a case where the trust is expressly denied in the answer, and if proved at all, but vaguely proved, by one witness only, without corroborating circumstances. It cannot, therefore, be set up in favor of these complainants.

We think the decree dismissing the complainant's bill should be affirmed. But the court decreed also, that the deed from Jesse Balentine to the complainants, should be cancelled. This, we think, could not be done, in the situation in which the case stands, Charles Balentine having filed no cross bill asking to have that deed, as a cloud upon his title, removed.

The decree will, therefore, be reformed, in this particular.

HUDDLESTON'S *adm'r.* vs. CURRIN.

A trustee holding title to personal property, but not having the possession, that being left with vendor by verbal agreement, is not guilty of a conversion in refusing to relinquish his title to the property.

This action of trover was brought in the Circuit Court of Williamson, by Huddleston, a constable, against Currin, a trustee. Huddleston, a constable, levied on a horse, the property of one Bateman, by *fi. fa.* and the horse was sent off to Williamson county, and was there levied on by *fi. fa.* at the instance of other creditors of Bateman, sold, and purchased by Charter. Charter conveyed the horse by deed of trust to Currin, as trustee for the benefit of his creditors. This deed recited that he "bargained, sold and delivered" the horse to Currin in trust for the benefit of his creditors. It authorized the trustee to sell the horse after the expiration of twelve months, if the debts were not paid, but was silent as to the possession in the mean time. The horse, by verbal agreement of the parties, did not go into the possession of Currin, but remained with Charter. Huddleston demanded a surrender of the title of the horse of Currin, which Currin refused. The case was submitted on plea of not guilty, to a jury, Maney, Judge, presiding.

He charged the jury, that a constable by levy acquired a right to personal property which would authorize an action; that the deed from Charter to Currin was not such as necessarily made Currin liable to this action of the plaintiff; that the possession of the goods by Charter for twelve months previous to the day on which Currin was authorized to sell was quite as consistent with the deed as the possession of Currin; and that if it was understood between them that Charter should retain possession for the twelve months, and he did retain the possession, the bare refusal of Currin within that time to relinquish his claim to the property under the deed of trust, would not be a conversion upon which the action of trover could be sustained.

The jury rendered a verdict in favor of the defendant, from which the plaintiff's administrator (the plaintiff having died and the suit being renewed by his administrator) appealed.

[Huddleston's adm'r. vs. Currin.]

*Alexander*, for plaintiff in error. Huddleston claimed the right to the horse in this suit by virtue of the special property vested in him by said levy, and by law he had such a special property in him as would authorize him to maintain this suit. *Baker vs. Miller*, 6 John. R. 195; 12 Johns. R. 407; 10 Wen. R. *Overton vs. Perkins*, 10 Yer. 329.

Charter and Currin stating in the deed, that Charter that day bargained, sold and delivered the horse to Currin, estops Currin from denying that fact. 2 Stark. 302; *Henderson vs. Overton*, 2 Yer. R. 396.

The defendant having taken the deed of trust conveying the property absolutely from Charter to himself for the twelve months next after the date of the deed, and refusing to deliver the property on demand of the plaintiff's agent, was an absolute conversion; and the plaintiff had the right to have the law charged in that way without the conditions stated in the charge. 2 Leigh's N. B. 1481; *McCombie vs. Davis*, 6 East. R. 538; *Reynolds vs. Shuler*, 5 Cow. R. 323, 326, 326; *Connah vs. Hale*, 23 Wend. R. 462, 466, 467.

The possession of Charter was only as agent or tenant at will of Currin, who had the immediate right to possession. 7 Yer. R. 444-5. But even if Currin had parted with the property before demand made by the plaintiff, he would be liable in this suit. *Hadley vs. Rowan*, 5 Yer. R. 301.

*Foster*, for the defendant in error.

REESE, J. delivered the opinion of the court.

This is an action of trover to recover the value of a horse, alledged to have been converted by defendant. The horse was not, and had never been in the actual possession of defendant: he was included among other property in a deed of trust, made by one Charter to defendant as trustee, to secure the debts of third persons, and the trustee was empowered, after the lapse of twelve months, to sell the property. This suit was brought within the twelve months; and the only evidence of conversion is, that Currin being asked by plaintiff if the horse was in the



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deed of trust, said he did not know; and being inquired of, whether, if so included, he would not surrender all claim to the horse, he replied that he would not. The court charged the jury, that during the twelve months previous to the time limited in the deed of trust for the sale of the property, the possession of Charter was consistent with the title of Currin; and if by the understanding of the parties, the property during the twelve months was to remain in the possession of Charter, and did so remain, then the mere refusal of Currin, the trustee, to surrender his claim by virtue of the deed of trust, would not amount to an act of conversion in him.

We are unable to perceive any error in this charge of the court. If the deed of trust be silent on the subject of possession—if the trustee has no present power to sell, and if the understanding or agreement were that the grantor should retain possession of the property till the sale—the trustee does no wrongful act, is guilty of no conversion, when he simply refuses to relinquish the title to the property.

Let the judgment be affirmed.

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McMULLEN vs. GOODMAN.

The plaintiff gave notice of an intended motion against a constable for the non-return of an execution against James Lowry. On the trial he offered a judgment and execution against James and Almon Lowry. Held, that they were admissible: the same certainty is not required in proof as in pleading.

This motion by Goodman against McMullen and his sureties was tried before Judge Martin in the Circuit Court of Montgomery, and a judgment rendered against the defendant, from which he appealed.

[In this case, the records do not show who appeared for the plaintiff in error, or defendant in error.]

TURLEY, J. delivered the opinion of the court.

This is a case of a motion against a constable for the non-

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return of an execution made before a justice of the peace of Stewart county. The notice is for not returning an execution against James Lowry. Upon the trial, the judgment and execution were both introduced in evidence; from which it appeared that the judgment had been rendered against James Lowry as principal, and was staid by Almon Lowry, and that execution had been issued against both James Lowry and Almon Lowry. Judgment was given against the constable McMullen, who appealed to the Circuit Court, where the question was whether the execution should be read; which was permitted to be done, and an appeal is thereupon prosecuted to this court.

The judgment and execution upon which the motion was founded were read in the Circuit Court, and are made a part of the record by the bill of exceptions. The same question which was made in the Circuit Court is again made here; that is, whether the reading of the execution should have been prohibited because the notice was for the non-return of an execution against James Lowry, and the execution was against James and Almon Lowry.

We think it would be to stick in the bark to hold that it should.

The execution was certainly against James Lowry, and in that particular complies with the notice; but it is also against Almon Lowry the stayor. Does this necessarily make it a different paper? It might be a misdescription of it, were it declared upon, and therefore fatal; but the same certainty has never been required in proof as in pleading.

Plaintiff in error had notice and made defence before the justice and in the Circuit Court, and we must affirm the judgment.

## COLEMAN vs. EWING.

The contract of the maker of negotiable paper is broken by a refusal or neglect to pay on the last day of grace, within reasonable time after demand made, and the holder has a right of action on the same day.

Ewing instituted this action of debt against T. B. & L. C. Coleman, the maker and endorser of a promissory note, in the Circuit Court of Davidson county, and a verdict and judgment were rendered in favor of the plaintiff, Maney, Judge, presiding, from which the defendants appealed in error.

*Trimble*, for the plaintiffs in error.

*Andrew Ewing*, for the defendant in error, cited and commented on 1 Metcalf, 43; 1 Nott & M'Chord, 444; 7 N. Hampshire, 201; 4 Greenleaf, 479.

TURLEY, J. delivered the opinion of the court.

T. B. Coleman, on the 1st day of July, 1842, executed his promissory note for the sum of twelve hundred and fifty dollars, to L. C. Coleman or order, at six months. This note was endorsed by L. C. Coleman to James Johnson, and by Johnson to defendant in error, O. Ewing.

On the 4th day of January, 1843, it being the last day of grace upon said promissory note, the same was duly protested for non-payment, and notice thereof duly given to those entitled to receive it: immediately thereafter, and on the day of the protest, this suit was commenced against the plaintiffs in error, to which they have pleaded in abatement, that the suit was commenced before the money specified in the note was due. And the question now presented for consideration is, whether a suit can be commenced on the third day of grace upon commercial paper, which is on that day duly dishonored, and notice thereof given to the parties previous to the commencement of the suit.

That in cases of ordinary contracts, not negotiable, the payor has the last moment of the day, on which the contract falls due, to discharge the same, and that he cannot be sued before that moment has elapsed, is so well, and so strongly settled, that it

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needs no examination from this court. And the reason why it has been so settled is obvious; the day has been fixed by contract, and till it has passed, the contract has not been violated, and of consequence no breach can be assigned upon it.

But this reason does not apply to the days of grace, which had their origin in the courtesy of merchants, for they were given, not by contract, but by courtesy, and by that courtesy the debt was always demandable on the third day of grace, and the evidence of it was dishonored if not paid on that day within reasonable business hours. When the debt then might be dishonored, if not paid on that day within reasonable business hours, and the liability of parties fixed by notice on that day, surely as soon as this is done, the right of action accrues, because the contract has not been performed according to its terms and stipulations, but is broken in all its particulars..

This question came up for consideration before the Supreme Court of Massachusetts in the case of *Staples and another vs. The Franklin Bank*, 1st Metcalf's Rep. page 43, where it is examined with great care and ability by Chief Justice Shaw, and all the cases bearing upon the point reviewed. The result of his opinion, in his own words, is: "On the whole, we think the weight of authority is in favor of the conclusion to which we have come; and if it were a new question, it seems to follow, on legal principles, as a fair and legitimate conclusion from the established fact, that the contract of the acceptor or maker is broken by a neglect or refusal to pay on demand, within reasonable time, on the last day of grace, that the holder may have his action."

We can add nothing to the argument and investigation there given to this question, and yield our ready and willing assent to the conclusion, as above stated.

The judgment of the Circuit Court is, therefore, affirmed.

**HOPSON vs. FOUNTAIN.**

Where a judgment is rendered on a verdict without a plea, such judgment is erroneous and reversible.

Fountain instituted an action of covenant against Hopson, in the Circuit Court of Montgomery county, on an obligation for the payment of Mississippi bank notes. The case was submitted to a jury without a plea, and a verdict rendered in favor of the plaintiff for the sum of \$309 damages, and judgment rendered thereupon. There was no bill of exceptions or appeal from the judgment.

The defendant filed a transcript of the record in the Supreme Court, and prayed a writ of error.

*Boyd*, for the plaintiff in error.

*Kimble*, for the defendant in error.

**TURLEY, J.** delivered the opinion of the court.

This is a case where a verdict and judgment have been rendered without pleas. This is error. We have said that the want of a similiter is cured by verdict; that pleas in short will be considered as good pleas, when received by the counsel; but where there can be no issue or any thing purporting to be one, there is nothing for a jury to try, and, therefore, nothing upon which a judgment can be based. A judgment by default, which is an admission of the right of action, is the proper course to pursue.

Judgment reversed, and case remanded to be proceeded in.

**RAMSEY vs. CLARK.**

If a note is made for sale in market to raise money, and is sold at a greater rate of discount than six per cent., the transaction is usurious if the purchaser is cognizant of the facts at the time of the purchase: *secus*, if he was not informed of the facts at the time of purchase.

This case was brought by appeal from a Justice of the Peace to the Circuit Court of Warren county, where it was tried before Judge Marchbanks and a jury of Warren county, and resulted in a verdict in favor of the plaintiff for the sum of \$23. A motion for a new trial was made and overruled, and defendant appealed.

*Taul*, for the plaintiff in error.

*Turney*, for the defendant in error.

GREEN, J. delivered the opinion of the court.

This is a suit commenced before a Justice of the Peace, to recover money which the plaintiff alleged he had paid upon a usurious contract. It appeared in evidence, that the plaintiff below, Joseph Clark, procured his father, Absalom Clark, to execute to the plaintiff his note for \$75, due twelve months after date, with a view to raise money on it. This note was sold to Ramsey for \$60. When this note fell due, the said Absalom executed to Joseph Clark a note for \$90, also payable twelve months after date, and this note was given to Ramsey to take up the one for \$75. When the \$90 note fell due it was paid, and this suit was brought to recover the excess over six per cent. per annum, that was discounted in these two transactions.

The court charged the jury in substance, that if the note was made as the result of a business transaction, the payee might sell it at a greater discount than six per cent. per annum, if he thought proper, and the transaction would not be usurious; but, that, if the note was made for accommodation, to be sold in the market to raise money, and it was purchased at a greater rate of discount than six per cent per annum, the transaction

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would be usurious. And, that, it is unimportant whether the purchaser of the note knew it was made for accommodation, to be sold in the market to raise money, or not; that under such a state of facts, the transaction would be equally usurious without notice as with it. In a criminal prosecution the law would be different, because, in such case, the intent with which the act was done would be material. The jury found a verdict for the plaintiff for \$28. The court refused to grant a new trial, and the defendant appealed to this court.

We think the court erred in the latter part of the charge, in which the jury were told, that the purchaser of a note at a greater discount than six per cent. per annum, would be guilty of usury, if it should turn out that it was made for accommodation, and was not a real transaction, although he might be entirely ignorant of the consideration for which the note was made. We do not understand any decision of this court to have gone so far, and we think, upon principle, the proposition is erroneous.

The 4th section of the act of 1834, (Ca. & Nich. 407,) provides a remedy, "when a greater sum, than that prescribed in the third section, is reserved directly or indirectly." It is manifest that this language is not applicable to the business transaction of purchasing a note, but it does embrace the case where there is a negotiation for a loan of money, and the stratagem is resorted to of obtaining an accommodation note of another person to be sold, with a view to evade the laws against usury. In such case the usury is in fact and in substance reserved indirectly; although it is in form the purchase of a note, yet it is in substance a loan of money. But if the purchaser of the note knows nothing about the consideration for which it was made, and takes an assignment of it, supposing it to be a lawful business transaction, he can be guilty of no desire indirectly to reserve a greater amount of interest than the law allows. In form it is admitted the contract is valid and that it becomes invalid, by showing that it was a contrivance to evade the law, and in fact indirectly reserving usurious interest.

The case of *Dew vs. Eastham* (2 Yerg. Rep. 463,) was plainly one of this kind. In that case, John Dew applied to East-

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ham to borrow money. He told him he would buy cash notes at the usual discount. He was asked if he would take cash notes on J. C. Dew; he replied, he would. J. C. Dew then made four notes of \$25 each, and one for \$12 50, payable to John Dew, and these were by him endorsed and sold to Eastham for \$75. All the parties then went before a Justice of the Peace, and the Dews permitted judgment to be rendered against them for \$112 50; Eastham was to wait four months. This was very properly held to be an usurious transaction. But if Eastham had known nothing of the transaction until the notes were brought to him, and he had purchased them, supposing J. C. Dew owed the money, the case would have been very different. It would be impossible in such case, for him to be guilty of a contrivance to evade the law, and indirectly to reserve usurious interest.

But it is argued, that if usury enters into a contract between the original parties to a note, it follows the note into the hands of innocent assignees, and that by a parity of reasoning, the charge of his Honor, in the case, was correct.

It is certainly true, in the case stated, that the maker of the usurious note could avail himself of the defence, even against an innocent assignee, who might become the holder. And this is the decision in the case of *Tait vs. Hannum*, 2 Yerg. Rep. 350. The reason is, that the note was void by the law, on account of the usury. And a void surety does not become binding by reason of having been endorsed to an innocent holder. But this reason has no application to the case now before us. This was no void surety in the hands of the plaintiff before he endorsed it to Ramsey. It received its taint, if at all, in the contract between these parties. But as the form of this contract is such as the law sanctions, to make it invalid, it must be shown that the parties intended that which the law forbids. As it regards the second note, it is admitted there was usury, and it may turn out upon another trial, that Ramsey knew of, and entered into the contrivance by which the first note was made.

Let the judgment be reversed, and the cause be remanded for another trial.



**MARRIGAN vs. PAGE.**

1. A due bill is in legal effect a promissory note, and as such assignable, and where for a money demand negotiable.
2. The word "payee" in the act of 1807, ch. 95, embraces an assignee, and the assignee of a note for specific articles, is entitled to recover the value of specific articles in his own name, upon compliance with the requisitions of the statute.
3. A Justice of the Peace has jurisdiction to the extent given by the legislature over money demands, in all cases where, by the terms of the contract, specific articles are to be delivered, or services performed, if such contract ascertain the money value of such services or articles.

Page recovered a judgment against Marrigan for \$100, before a Justice of the Peace of Davidson county. The defendant appealed to the Circuit Court, where the case was submitted to a jury; Maney, Judge, presiding. A verdict was returned in favor of the plaintiff, and a motion for a new trial having been made and overruled, and judgment rendered, the defendant appealed in error to the Supreme Court.

*A. Ewing*, for the plaintiff in error, cited and commented on the following authorities; Peck's Rep. 134, 1 Yerger, 165, 9 Yerger, 270.

*Fletcher*, for the defendant in error. See act of 1831, ch. 59, 1835, ch. 17, 1 Yerger, 101, 5 Yerger, 435, 9 Yerger, 270, 5 Yerger, 451.

**REESE**, J. delivered the opinion of the court.

The plaintiff in error, William D. Marrigan, made to James C. Ring, the following note or instrument:

"Due Mr. James C. Ring or order one hundred dollars in tailoring, I the said undersigned furnishing cloths at the city prices, also tailoring services.

Nashville, Sept. 1, 1841.

WM. D. MARRIGAN."

This note, by a written endorsement thereon, was assigned by James C. Ring to the defendant in error. The defendant in error, the assignee of the instrument, having given ten days notice to the maker, of the place where payment was to be made, as was supposed to be required by the act of 1807, and

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default having been made, brought his suit before a Magistrate, and recovered a judgment for one hundred dollars. Marrigan appealed to the Circuit Court, where judgment was again rendered against him. He has appealed, in error, to this court, and he has here, by his counsel, in argument, assigned several supposed errors.

1st. That this instrument is not assignable by law, so that the assignee can maintain an action in his own name. But by express legislative enactment, a note or agreement for the payment or delivery of specific articles, or for the performance of any duty is made assignable, and the assignee authorized to prosecute a suit in his own name. And as to the form of this instrument, a due bill is in legal effect a promissory note, and assignable as such, and when for a money demand, negotiable also.

2. It is insisted, that the act of 1807, ch. 96, provides, that the ten days notice must be given by the payee, and does not mention in terms and *eo nomine*, an assignee, and it is insisted that an assignee cannot give the notice. If this were so, one of two consequences would follow, either that the assignee could not sue at all upon such instrument, or that he could recover the money without such notice. But he can sue in his own name, by the express provisions of the act of 1801.

The other consequence, therefore, would follow, that when assignment has taken place, the maker of such instrument, must in every case pay the money at all events, instead of delivering the specific articles or performing the stipulated services; a construction which would narrow or defeat, but not advance the legislative remedy, intended for the benefit, not of the holders, but the makers of such instruments; a construction, therefore, for which the latter have no motive or reason to contend. The word "payee," therefore, in the act of 1807 must be held to embrace the person beneficially entitled to recover the specific articles, the services, or their equivalent, the money.

3rd. It is further insisted, that the Justice of the Peace had no jurisdiction in the present case. By the act of 1835-6, a Justice has jurisdiction to the extent of one hundred dollars, where

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the evidence of the demand is such as the statute requires, and where the demand itself does not sound in damages. A demand for specific articles, or for the performance of services, where the contract does not specify the money value of those articles or services, does sound in damages, does necessarily require the production of testimony for the ascertainment and assessment of value before the tribunal rendering the judgment. And if the value of such articles or services exceed fifty dollars, the Justice has no jurisdiction, the legislature not having confided to him in demands above that amount, any further power or duty than, on the part of the plaintiff, to compute the interest on the amount specified by the terms of the instrument; and on the part of the defendant, to investigate and determine questions as to the validity of the instrument, its payment, satisfaction and the like. But although by the terms of the contract, specific articles are to be delivered, or services to be performed, yet if such contract ascertain the money value of such articles or services, the Justice will have jurisdiction to the extent given by the legislature for money demands; because such claim does not sound in damages; because no testimony has to be adduced or heard to ascertain or assess the value of the articles or services; no judgment or discretion on the part of the Justice to be exerted to fix the limit of the plaintiff's claim as existing on the face of the instrument, the terms of the contract itself having specified the money value of the demand.

These general principles will apply to and determine every case which can arise. They apply to and determine the cases, where a party stipulates to pay any given amount "of" or "in" bank notes, or cash notes. Here, although the word "dollars" is a term of the contract, yet it is held upon the construction of such instruments, not to be a term employed for the purpose of fixing the money value of such demand, but a term referring itself to the word "dollars" as used in the bank notes, or cash notes, stipulated to be received in payment, and meaning the numerical amount, and not the value of the specified dollars in bank notes, or cash notes, and, therefore, such demand "sounds in damages"; proof must be heard; investigation take place; judgment and discretion be exerted to ascertain and assess the

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money value of the numerical amount of the bank note, or cash note "dollars" specified. This the Justice is not trusted to do, above the amount of fifty dollars. There are contracts not very unlike, in terms, the one above described, where a Justice would have jurisdiction, as where a party stipulates to pay so many dollars—evidently using that term, as meaning the standard of money value—and super-adds a condition, that that amount of money or standard value may be discharged, or will be received in the same nominal or numerical amount of bank notes. Here if the bank notes, or cash notes, be not paid at the time specified, the sum certain of the standard or money value mentioned in the contract is due, and a Justice, upon the general principles herein stated, would have jurisdiction. If these distinctions seem nice, and produce much practical difference in cases where parties to contracts may be supposed, by some, to have intended none, still they result from the application of general principles of construction long since adopted in this State, and too firmly fixed to be now shaken.

They must now be well understood in all our courts of justice, and a little judicious enquiry and enlightened attention on the part of Justices, may protect them from frequent practical error.

We are of opinion, therefore, that in the case before us, the Justice of the Peace had jurisdiction, and upon the whole matter, we affirm the judgment of the Circuit Court.

**McGAVOCK vs. BROWN & WILLIAMS.**

1. Cumulative evidence is evidence which speaks to facts, in relation to which there was evidence on the trial, and a new trial ought not to be granted on such evidence, though it be new and material.
2. There is no rule of law which will exclude the admission of cross affidavits on a motion for a new trial, either in civil or criminal cases; yet the practice in civil cases ought not to be encouraged.

Brown & Williams instituted this action of assumpsit in the Circuit Court of Davidson county, against McGavock, and it was submitted, on the plea of non-assumpsit, to a jury at the May term, 1842, and resulted in a verdict for the plaintiffs, for the sum of two hundred and eighty-six dollars. On motion of defendant, this verdict was set aside.

At the May term, 1843, it was again submitted to a jury, who rendered a verdict in favor of the plaintiffs for the sum of three hundred and seventy-seven dollars. A motion for a new trial was made, and being overruled by the presiding Judge, Maney, and a judgment rendered thereupon, the defendant appealed.

*Meigs*, for the plaintiff in error.

*E. Ewing* and *Fletcher*, for the defendants in error.

GREEN, J. delivered the opinion of the court.

This is an action against the plaintiff in error, for the balance of an account for carpenter's work done for him by the defendants in error, who were partners.

Before the work was performed, one of the partners, Brown, was indebted to McGavock a sum between three and four hundred dollars, and on the settlement McGavock insisted that he should be credited by the amount of this debt. To this, Williams objected, and refused to allow the credit; and McGavock retaining that sum in his hands, this suit was brought.

On the trial, the defendants, in order to show that Williams had agreed that Brown's debt should be settled in this account, examined several witnesses, as to the admissions of Williams; who proved that they had heard him speak of an old debt

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Brown owed McGavock, and that he was fearful he would have to pay it, and expressions of a similar import. The jury found a verdict for the plaintiffs, and the defendant moved for a new trial upon his affidavit stating the discovery of the evidence of W. D. Dorris, who could prove the admission of Williams that the debt Brown owed McGavock was to be allowed him in the settlement. The defendant also read the affidavit of W. D. Dorris, who stated that he was called upon by Brown & Williams to assist in settling their partnership accounts, and that while engaged in making this settlement a conversation arose between them as to the debt Brown owed McGavock; and that Williams said the work would only come to about twelve hundred dollars, and that they would receive only between nine hundred and a thousand dollars, inasmuch as that debt of Brown's would have to be allowed.

The plaintiffs then read several affidavits, and among them, Benjamin Sharpe's, who stated that he was present at the office of Dorris when the books and papers of Brown & Williams were examined; that at the request of Brown & Williams he assisted in the examination of them, and he has no recollection that any thing was named by Williams relative to any debt due by Brown to McGavock: he stated that Dorris possesses very bitter feelings towards Williams. The court refused a new trial, and the defendant appealed to this court.

The question now is, whether this affidavit of Dorris is sufficient to entitle McGavock to a new trial.

A new trial ought not to be granted, although the evidence may be *new* and *material*, if it is only *cumulative*. Graham on New Trials, 462 et seq. Cumulative evidence is that which speaks to facts, in relation to which there was evidence on the trial. Now, Burton proved on the trial, that when he was about to measure the work, Williams requested him to allow a liberal price, saying "that there was an old debt of Brown's, which McGavock was claiming to have paid out of the work." On cross examination, Burton said Williams told him he was afraid he should have this debt to pay. Other witnesses testified to conversations of Williams relative to this old debt of Brown's. Now, Dorris's evidence is in relation to the same

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matter. He says, that in a conversation between Brown and Williams in his presence, Williams said "that Brown's old debt would have to be deducted from the amount due them from McGavock for the work," and that Brown knew that it was understood between them that his debt was to be deducted from the job."

This evidence is as to the same facts about which Burton and others had testified on the trial; that is, whether Williams had not agreed that Brown's debt to McGavock should be settled in this account, and whether he had not made admissions to that effect. If this be not cumulative evidence, it is difficult to perceive the meaning of the term.

But the counter affidavit of Sharpe, stating that he was present in Dorris's office when the books and accounts of Brown & Williams were examined, and that he did not hear the conversation related by Dorris, and that Dorris has bitter feelings against Williams, would be calculated so to weaken the force of Dorris's statement, as in all probability, if another trial were had, the result would be the same. The plaintiff in error insists that the counter affidavits should not have been heard. We do not think the practice of introducing counter affidavits on motion for a new trial should be encouraged; but if the Circuit Court shall receive them, we cannot say it is error.

In criminal cases, it has been the constant practice to receive counter affidavits, and new trials are every day refused upon the facts disclosed in such affidavits; and we know of no rule that will exclude them in civil cases.

Let the judgment be affirmed.

## CLARK vs. THE STATE.

In all cases of treason and felony, defendant must be present when the verdict is rendered; and if he be not present, the verdict cannot be permitted to stand.

Clark was indicted for perjury in the Circuit Court of Wilson county, and his case was submitted to a jury; Judge S. Anderson presiding.

The defendant was on bail and was not ordered into the custody of an officer when the trial began, but was permitted to go at large. The jury came into court for the purpose of giving in their verdict. The defendant, not being present, was called and did not appear. They then gave in their verdict of guilty, and fixed the defendant's time of service in the penitentiary at three years. The defendant afterwards came into court and moved the court to set aside the verdict and grant him a new trial. The motion was overruled, and judgment rendered on the verdict, from which defendant appealed.

*Haynes*, for the plaintiff in error.

*Attorney General*, for the State.

TURLEY, J. delivered the opinion of the court.

At the May term, 1842, of the Circuit Court for Wilson county, the plaintiff in error was tried, and convicted for the offence of perjury, and appeals to this court. Upon argument, several points are made for reversal, only one of which we think it necessary to notice, as that is conclusive upon the case. When the verdict was rendered, the prisoner was not present, having been permitted to go at large during his trial. He was called, but did not appear. Can a verdict so rendered in a case of felony be sustained? Assuredly not. In favor of life and liberty, a man charged shall be present when a verdict affecting the one or the other is to be rendered against him, for perchance he may be able to show cause against it.

And so is the law as long since expounded. Chitty, in the first volume of his work upon Criminal Law, says, "The ver-



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dict, whatever may be its effect, must in all cases of felony and treason be delivered in the presence of the defendant in open court, and cannot be either privately given or promulgated while he is absent." Coke Lit. 227; 3 Inst. 117; Sir Thomas Raymond, 198; 2 Hale, 300; Hawk. b. 2, c. 47, s. 2; 4 Black. Com. 340; Bacon's Abridg. Verdict; Burns's Justice, Juror. V.

We therefore reverse the judgment of the Circuit Court, set aside the verdict, and remand the case for a new trial.

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THE STATE vs. LOVE.

A presentment found, not on the knowledge of any of the grand jury, but upon information detailed to the jury by others, should be abated on the plea of defendant.

This presentment was tried by Judge Dillahunt and a jury of Maury county, and resulted in a verdict and judgment for the defendant, from which the State appealed.

*Attorney General*, for the State.

*Nicholson*, for the defendant.

TURLEY, J. delivered the opinion of the court.

This is a presentment against defendant, at the June term, 1842, of the Maury Circuit Court, for permitting his slave Sampson to retail and trade in spirituous liquors contrary to the form of the statute in such cases made and provided. This presentment is in due form signed by all the members of the grand jury.

To this, defendant pleaded in abatement, that the presentment was not found upon the knowledge of the grand jury, or any one of their body, but upon the information of a certain Newman C. Gillespie, who was not sworn before the court and

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sent to said grand jury, previous to his being examined by said grand jury. The plea is in due form.

To this plea there is replication and issue, by the Attorney General.

Upon the trial, defendant introduced one Wyly E. Embry, a member of the grand jury, who deposed that the bill of presentment was made upon the testimony of Nehemiah C. Gillespie, and that the grand jury knew nothing of the supposed offence, of which defendant was charged, of their own knowledge. Also, Nehemiah C. Gillespie, who deposed, that for two weeks the grand jury, or some of the members thereof, insisted on his going before them and giving evidence against the said defendant; and he was at last prevailed upon to do so, and informed against said defendant, but was not sworn previous to said examination. The jury found a verdict for defendant. This is all correct. It is not like the case of *The State vs. McManus*: there the plea does not deny that the presentment was made upon the information of some member of the grand jury, but attacks the source of their information. Here it does deny that the presentment was made upon the knowledge of any one of the grand jury, and asserts that it was upon information detailed before them by a witness who was not sworn, and the truth of the plea is proved. This case, then, falls within the perview of *The State vs. Smith*, M. 99; and the judgment of the court upon the plea in abatement is right.

Judgment affirmed.

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THE STATE vs. WATKINS et als.

An indictment which charges that the defendant with force and arms took a negro slave from the field and possession of the owner, does not charge an indictable offence.

The grand jury of Williamson county, at the July term of the Circuit Court, 1843, returned a bill of indictment against Watkins, charging that Watkins, on the 21st day of July, 1843, with force and arms, in the county of Williamson, entered into

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the possession of B. B. Loon, and then and there forcibly took and carried away out of the possession of said Loon, his man slave called Allen, the property of said Loon, and him, the said slave Allen, with like force, detained from the possession of said Beverly B. Loon, &c.

This indictment, on the motion of defendant, was quashed, and the State appealed.

*Attorney General*, for the State.

*Marshall*, for the defendant.

TURLEY, J. delivered the opinion of the court.

This is an indictment against the defendant in error for forcibly taking and carrying away out of the field and possession of one Beverly B. Loon, a negro slave, Allen, the property of said Loon.

The Circuit Judge quashed the bill of indictment upon the ground that no indictable offence was charged; and the question for our consideration is, whether the allegation that the negro was taken from the field and possession of his master is a legal allegation of a breach of the peace; and we hold that it is not, upon the authority of the case of *The State vs. Farnsworth*, 10 Yerger, 261, and the case of *The State vs. James R. Love*, 2 Devereux & Battle's North Carolina Law Reports. In the case of *The State vs. Farnsworth*, this court held that an indictment charging that the defendant, with force and arms, one chesnut sorrel mare, the property of John A. Park, did unlawfully and forcibly take from and out of the possession of the said John A. Park, was not good, because it contained no allegation of a breach of the peace, but merely a trespass. We know no reason the principle should be differently applied to one species of property and another, a horse or a negro.

In the case of *The State vs. James Love*, the Supreme Court of North Carolina held, that an indictment for forcible trespass to chattels, must charge the trespass to have been committed in

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the presence of the owner, and the taking to have been from his actual possession.

This the present bill of indictment does not. We therefore think the Circuit Judge committed no error in quashing it, and affirm the judgment.

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THE STATE vs. McMANUS.

The defendant has no right to impeach by plea the information of the grand juror upon whose knowledge a presentment is made.

*Attorney General*, for the State.

*Nicholson*, for defendant.

TURLEY, J. delivered the opinion of the court.

This is a presentment by the grand jury of Maury county, made in due form, against the defendant McManus, at the August Circuit Court, 1842, for the offence of usury. At the January term, 1843, defendant appeared in person, and pleaded in abatement, "that the presentment against him was not made upon the knowledge of the grand jury presenting the same, or any of them, but that the same was made alone upon the information obtained by said grand jury, or some one of them, from one James Dicky, who was not sworn before the court having cognizance thereof, or before the jury or any other person having the right to administer such oath."

To this plea, there is a demurrer on the part of the State, which was overruled by the court below, and judgment of discharge in favor of the defendant pronounced. In this case, we think that was error. This is not a case in which the plea avers, that the presentment was found upon the testimony of a witness examined before the grand jury, where they had no power by law to send for and examine him, as was the case of

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*The State vs. Smith*, reported in Meigs, 99; but it is a case in which defendant attempts to impeach the knowledge of the members of the grand jury who gave the information upon which the presentment was based, by connecting it with information obtained by him, or them, from one James Dicky, and falls directly within the principles of the case of *The State vs. Darnal*, 1 Hump. R. 290, in which the court say such a course will not be permitted.

The demurrer was therefore improperly overruled, and the judgment must be reversed, the demurrer sustained, and the case remanded for a trial upon its merits.

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YERGER vs. RAINS.

1. A clause in the constitution of the State of Mississippi declares, that the introduction of slaves into that State "as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." Held, that this was, *per se*, an inhibition without the aid of legislative enactments.
2. A contract for the sale of slaves brought into the State of Mississippi for sale being void by the constitution of that State, is void in Tennessee, and the courts of this State will not aid the vendor in recovering the purchase money, or the vendor in recovering back the slaves sold.

This action of trover was submitted to a jury of Davidson county on the plea of not guilty, Judge Maney presiding, and resulted in a verdict for the defendant. The plaintiff appealed. The facts are all stated in the opinion of the court.

*E. Ewing, Campbell and Fletcher*, for the plaintiff. See Constitution of Mississippi, article 7; Statutes of Mississippi, 199, sec. 89, 90; 5 Howard, 80, 99; *ibid*, 869; Meigs, 421; Story's Confl. sec. 242, 243; 4 Cow. 510, note; 2 Kent's Com. 457; Chitty on Con. 535; 5 Mass. 286; 17 Mass. 258, 5 H. & L. Rep. 193.

*Fogg*, for the defendant.

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REESSE, J. delivered the opinion of the court.

This is an action of trover brought by the plaintiff, a citizen of the State of Mississippi, against the defendant, the sheriff of Davidson county in the State of Tennessee, to recover the value of two slaves. Upon the trial it appeared in evidence, and by the agreement of the parties, that the slaves in question were the property of Yerger in the year 1838, when he was a citizen of and resident in the State of Tennessee; that in that year he sold them to one Bankhead, and in October of the same year he removed to and became a citizen of Vicksburg, in the State of Mississippi; that after his removal, Bankhead became dissatisfied with the slaves, the contract was rescinded, and they again became the property of Yerger; that the slaves having been placed in jail for safe keeping, Yerger wrote to his agent in the winter of 1838-9 to send them to him at Vicksburg, stating that he thought they would bring a better price at that place, and that he would sell them at that place, and they were in the winter of 1838-9 sent to him at Vicksburg; that those slaves were originally bought by Yerger for family use, but they not suiting him he had them sold as before stated to Bankhead; that after the arrival of the slaves at Vicksburg, Yerger, on the 20th February, 1839, sold them to Owen Lane for twelve hundred dollars, on twelve months credit, and received from said Lane his note under seal for that amount, payable twelve months after date; that he made a bill of sale to Lane in Vicksburg, and delivered him the slaves there; and Lane brought them to Tennessee, where they were levied on by execution in the hands of defendant against Lane and sold as his property; that Lane at the time of the purchase in question was a citizen of and resident in Tennessee; that at the sale by the defendant as sheriff, Yerger, by his agent, forbid the sale and claimed the property. The defendant read in evidence judgments and executions against the same, showing his power and duty to sell the same.

This suit was brought on the 3d day of September, 1839.

The printed laws and constitution of the State of Mississippi and the judgments of its courts supposed to bear upon the case,

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were by consent of the parties read to the court and jury upon the trial of the cause and in like manner agreed to be regarded as a part of the record in the Supreme Court. The Circuit Court charged the jury, that if the plaintiff carried, or caused to be carried, the slaves in dispute, to the State of Mississippi for sale in 1838, such transportation was in violation of the laws of Mississippi, and that the criminal offence was complete so soon as the slaves entered the State; that if the plaintiff took any note, bond or security for the purchase money, it was void by the statute of Mississippi passed in 1837, but the sale itself was not void and vested Owen Lane with a title at law to said slaves, which was subject to sale under an execution against him for his debts." A verdict was rendered in favor of the defendant. The plaintiff moved for a new trial, which was refused, and he has prosecuted his appeal to this Court. The cause was taken up at the last term of this court; but because the decision of the Supreme Court of the United States in the case of *Graves vs. Slaughter*, reported in 15 Peters, had given a construction to the prohibitory clause of the constitution of the State of Mississippi on the subject of the introduction of slaves as merchandise within that State, and had declared the legal effect of that clause, in a manner variant from and in conflict with the previous judgments, on the same subject, of the State Courts of Mississippi; and because we did not and could not know what influence upon the opinions of the last named courts, the decision referred to might produce; we deemed it to be our duty to direct the case to lie over until the present term, supposing that in the mean time the final judgment of the Court of Errors and Appeals of Mississippi, upon the subject, would in the intermediate time be laid before us.

This has been done. The clause of the Mississippi constitution in question declares, "that the introduction of slaves into that State as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." The High Court of Errors and Appeals of the State of Mississippi, upon full and elaborate discussion in the cases of *Green vs. Robertson*, *Hise & Fitzpatrick vs. Glidewell*, and *Cowan and others vs. Boyce* and others, all reported in 5 Howard, had determined that the clause

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in question is not a mandate merely to the legislature, but is an inhibition *per se*, and that all contracts for slaves, so introduced into the State after the first day of May, 1833, are void by virtue of that clause. The Supreme Court of the United States, as we have said, in the case of *Graves vs. Slaughter*, hold the clause to be mandatory to the legislature to prohibit the introduction of slaves, but not to be, by its own proper force, a prohibition. Since the publication of that opinion, the question has again come under the consideration of the Court of Errors and Appeals of Mississippi, in the case of *John S. Brian vs. John B. Williamson*, determined in March last, and in an opinion delivered by Chief Justice Sharkey, which exhibits patient investigation, extensive research, and vigorous thought, the court unanimously declare their adherence to their first conclusions. The law of Mississippi then is, that the introduction of slaves into that State as merchandise, and their sale, is contrary to the public and constitutional policy of that State, and that therefore such introduction is a public wrong, and such sale void. That question the courts of Mississippi have a right to determine; that question they conclusively determined. If our views with regard to the proper construction and legal effect of that portion of the Mississippi constitution differed from that of their judges, it would be our duty cheerfully and promptly to surrender such views; and concurring, as we do, with the courts of Mississippi in the correctness of the exposition made by them, it were idle and useless to attempt, by any reasoning or researches of our own, to fortify their position: they need it not.

When a contract is *invalid*, by the law of the place where made, it is held to be invalid in all other places or countries where it may be drawn into question; and this, we take it, without any exception whatever. But when a contract is *valid*, by the law of the place at which it is made, it will, in general, be held to be valid and be enforced in all other places, subject to be controlled, however, in some instances, by the public policy of the place of the former. A contract of sale of slaves introduced into the State of Mississippi as merchandise, since the first of May, 1833, is invalid and void by the law of Mississippi; and being so invalid and void, it will be held here in



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Tennessee to be invalid and void also. These two propositions are very clear. And what is not a little singular, the counsel for the plaintiff and for the defendant alike insist upon the truth of these two propositions and upon their decisive influence upon the case before us. The counsel for the plaintiff insist, that the sale from Yerger to Lane, being against the public and constitutional policy of Mississippi, and therefore void, the delivery and bill of sale of the slaves from Yerger to Lane and the bill single from Lane to Yerger are as if they were now and heretofore non-existent and present no obstacle whatever to the recovery of the negro slaves, the title being and having been, and remaining during all the time, in him. The counsel for the defendant contends, that the contract of sale, the bill of sale evidencing it, the note for the consideration, are all void, indeed, as being against the public policy of Mississippi, but they are not void in the sense of non-existence; they do exist, and they constitute an insuperable obstacle to the plaintiff's recovery, his very case imposing upon him the necessity, in his character of plaintiff, to found his right to recover, upon his own violation of the law and public policy of the State. The question in this phasis of it, has not come, so far as we are aware, under consideration in the courts of Mississippi. They have determined repeatedly, that the vendor cannot recover the consideration money, when it is in the power of the vendee to show that the contract was in violation of public policy. Those courts, it would seem, have not yet been called on to determine that such vendor, having sold and delivered a slave, having executed a contract against law and public policy, shall not be permitted to alledge *that*, and recover back his slave.

But the fact of no such case having arisen or having been determined there, we deem altogether immaterial, the question being one at common law, the principles being clear and indisputable, and the case presenting no other difficulty than the application, by means of reason and common sense, of those clear and indisputable principles, to the attitude of the parties and the facts of the case. This is an executed contract. The plaintiff says it is invalid and void, because against the constitution and law and public policy of Mississippi, and therefore he

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must be permitted to recover the slaves or their value. Will the courts permit this? will the courts, he being actor, lend him their aid? We are well satisfied they will not. If they should, the law, the constitution, the public policy of Mississippi, would go for nothing, and the courts themselves would be made the agents and instruments for the counter-action and defeat of the constitution and public policy. If this suit can be maintained, the slave trader can be permitted to take into the State of Mississippi his hundred slaves, sell them all, get paid for their full value, deliver them, execute bills of sale and leave the country, and he can afterwards bring his suit for each of them and recover them or their value. What shall prevent him from recovering, if the principle to which we have alluded will not do it? Shall the fact, that he was paid for them all at the time of delivery, have the effect to repel his recovery, in an action of detinue or trover? That circumstance can have no such effect. The contract of sale, void by public policy, is not made valid by the payment of money. And this very plaintiff would have precisely the same right to recover in this action, if instead of receiving a bill single for twelve hundred dollars, due some months after the commencement of this action, he had in fact received at the time of delivery of the slaves the sum of twelve hundred dollars in cash. And without putting a case of payment at the time of sale, the slave dealer would have nothing to do but to sell and convey the negroes, and some years afterwards, at his convenience, bring his action of trover and recover the value of the slaves and the value of the hire that had accrued; and the courts of Mississippi would be made the passive instruments for the effectuation of a scheme, the very scope and object of which was to baffle and overthrow the settled public and constitutional policy of the country. Courts have never permitted themselves to be so used: they have never so applied the great principles we are discussing. Take the case of the vendee: A Mississippi planter buys ten slaves from a trader; they are delivered; he gets a bill of sale, and he pays the money for them; he keeps them with a strong hand, but he brings an action for money had and received; he sets forth in proof the illegality of the transaction: what shall prevent him

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from recovering? Why, obviously, the principle we have been considering, and that alone, that where a contract has violated public policy, and the parties are equally derelict; neither party will be heard as a plaintiff to base his right to the aid of the court, upon the allegation or proof of his violation of the law. So in this case, as in most cases, the court would repel either party to the public wrong, coming to invoke the aid of the court on the ground of such wrong. The popular argument, therefore, as one to be entertained in a court of justice, has no solidity in it, that Mississippi should permit the trader to recover either the money or the slave, through the medium of a court of justice: he does not recover the money, for the *defendant*, because *he is such*, can, upon well settled principles, allege and show the invalidity of the contract: he does not recover the slave, because, *being plaintiff*, he will not, in that character, be permitted to allege the invalidity of the contract arising from his own wrongful act, as constituting the reason or ground for his action. And this is the condition of the parties in the numerous and varied classes of cases falling within the range and comprehension of the general principle we have been discussing. If Mississippi repels either party, coming as plaintiff from her courts of justice and enforces her penal statutes, her constitutional policy will have effect: if she suffer either or both to come as plaintiffs into her courts of justice, and allege the violation of law, and the consequent invalidity of the contract, as a reason why the property should be recovered back by the one, or the money by the other party, her policy would be defeated by such action of her own courts, and the controlling principle of such universal application, which we have been insisting would be by them overlooked or disregarded. We do not consider it necessary to cite English or American cases, on this subject. The same principle is intended to be applied in them all, and any discrepancy is more apparent than real, and results merely from the application of an admitted and well settled principle to varying facts and circumstances, and to the different attitude of parties in particular cases.

The case of *Allen vs. Dodd*, determined by this court at Knoxville in July last, presents a case of the application of

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this principle to a case bearing much resemblance in its facts and circumstances, and in the attitude of the parties, to the case now under consideration. Allen gave to Dodd the following instrument: "For value received, I promise to pay John Dodd two hundred dollars in specie whenever *Martin Van Buren* is elected President of the United States at this presidential election; and if either Van Buren or Harrison dies before the election in 1840, then the said Dodd is to receive but one hundred dollars."

At the time this instrument was made, Dodd delivered to Allen a grey horse, worth one hundred dollars. It was a wager on the impending presidential election. After the presidential election, Dodd sued Allen in debt, for the value of the horse, with a count in detinue.

The Circuit Court charged the jury, that the plaintiff might treat the contract as a nullity and maintain the action. This court held the contrary, and said, "If a party comes into court seeking to enforce an immoral or illegal contract, it is most obvious that he must be repelled by the court, if it would not countervail the very end and object of its creation. There are some cases, indeed, where something having been done, under such a contract a party comes not to enforce it, but in disregard and disaffirmance of it, to right himself for some injury sustained, or loss incurred, by means of it. This he may do, or not do, according to the times and stage of the affair, the nature of the transaction, and other circumstances. He may often do so, also, when the matter is consummated, as in transactions merely illegal, and where the parties, although both in fault, stand in a different relation to the transaction, and where the policy and interest of the community are in favor of permitting the one party to set aside the contract, without permitting which indeed, it would have been in vain to have declared it illegal, as contracts of an usurious character." But the court held the case then before them not to be of that character, but to be a contract against public policy, where the parties were equally derelict, and where each would be refused, the contract being executed, the aid of a court of justice.

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In this case we likewise incline to the opinion, that Yerger, as immigrant settler within the State of Mississippi, comes, as to the slaves in question, within the exception mentioned in their constitution, and that therefore his contract with Lane was valid.

This point it is unnecessary to determine. We seek not to meddle with the construction of foreign laws and constitutions, beyond the point required by the necessity of our position.

Upon the whole, then, although the Circuit Court took an erroneous view of this case, the verdict and judgment were right and must be affirmed.

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KIRKMANS vs. RICE et als.

A sheriff, after default in returning a *fi. fa.* requested the plaintiff to issue an alias for his benefit. It was issued; the plaintiff informing him, that in doing so he did not intend to waive his right of action. Held, that there was no waiver, though a part of the money was collected by the alias and received by the plaintiff after the default.

This motion was heard in the Circuit Court of Sumner, S. Anderson, Judge, presiding, and judgment rendered for the defendants, from which plaintiffs appealed.

*J. J. White*, for plaintiffs. It is contended, that the receipt of a part of the money by plaintiffs upon an alias *fi. fa.* is a waiver of any right of action against the sheriff for an insufficient return made of the previous *fi. fa.* The proof shows, that in point of fact there was no waiver. Was there none in law.

The case relied on, is that of *Trigg vs. McDonald*, 2 Humph. 387. That was a motion for a false return; this, for an insufficient return. The cases are entirely different. The case referred to by the court, in *Trigg vs. McDonald*, in Watson on Sheriffs, 204, 5 Law Lib. 147, is founded upon a case in 1 Carrington & Payne's N. P. C. 154, republished in vol. 11 of Eng. Com. Law Reports, 351. This was an action for a false

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return to a *fi. fa.* in favor of the plaintiff against Rose for £301. The sheriff returned, that he had levied £13. Evidence was then given to show the return was false. The defence was, that the plaintiff had received the £13. He was advised to consider before he received the money, as it would waive any further claim he might have against the sheriff. However, the plaintiff took the money. Abbott C. J.: "The plaintiff, by accepting the money, has, in point of law, waived all further claim against the sheriff. The reason of that being considered, a waiver is palpable. The sheriff tells you what he has done, and you accept his act." But no such presumption can arise here, either from the return of the sheriff, or the facts of the case which have been proved. It might just as well be argued, if the sheriff had returned, that he had made the whole of the money upon the execution, that the receipt of a part by the plaintiff, would be a waiver of all claim against him for the balance.

*Trimble*, for the defendants in error, cited and commented on the case of *Trigg vs. McDonald*, 2 Humphreys, 384.

TURLEY, J. delivered the opinion of the court.

This is a motion for a judgment against the defendant Rice as sheriff of Sumner county and his securities, for the non-return of an execution. The execution was in favor of H. & J. Kirkman the plaintiffs, and against William B. Preston, Moses C. Preston and Jesse Grant, bearing test the third Monday in October, 1841, and returnable the third Monday in February, 1842. This execution came to the hands of the sheriff on the 23d of November, 1841, and was returned by him "not satisfied." That this is no return, and that the sheriff and his securities are made liable thereby for the amount of the execution with damages and cost, at this day is not a debateable question. But an alias execution on the same judgment was issued bearing test the third Monday in February, 1842, which came to the hands of the same sheriff, and on which he collected some moneys, and paid them over to the plaintiffs. This, it is con-

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tended, was a waiver on the part of the plaintiffs, of the right they had acquired, by reason of the previous non-return, and that the sheriff is discharged thereby from responsibility for his previous neglect. Without entering into the question of what might be the effect of the issuance of an alias by the orders of the plaintiff after a defalcation of a sheriff and without his request, and a reception of money thereon, it is sufficient for this case, that the proof shows most abundantly, that the alias was issued at the request of the sheriff and for his benefit, and that he was expressly informed at the time, that plaintiffs would not agree that it should amount to a waiver of any rights they had against him on account of his previous neglect, and that this court has heretofore held, that in such case there is a continuing responsibility on the part of the sheriff, and no waiver of right on the part of the plaintiff in the execution. There are some other points mooted on the part of the defence, but not seriously pressed, and we do not think it necessary to notice them, as this is manifestly the point in which this case was determined by the Circuit Judge, assimilating it to the case in 2 Humphreys, 384, which it in no wise resembles.

The judgment of the Circuit Court is reversed, and we direct a judgment for the unsatisfied amount of the execution against the sheriff and his sureties, with twelve and one half per cent damages thereon and cost.

**HENRY, a slave, vs. THE STATE.**

1. The rejection of a juror in a criminal case improperly is not an error for which the court will necessarily reverse the judgment, if the defendant obtains an impartial jury of his own selection.
2. The case of *Deins vs. The State*, 2 Humphreys, and *Kirby vs. The State*, 3 Humphreys. Approved.
3. The case of *Chappel vs. The State*, 8 Yerger. Approved.
4. When a slave is indicted for an assault on a white woman with intent to commit a rape, it must appear in the bill of exceptions that the woman assaulted was a white woman.

Henry, a slave, was indicted for an attempt to commit a rape, and tried by Judge Martin and a jury of Stewart county, and convicted. He appealed. The facts are stated in the opinion of the court.

*Rivers and Garland*, for the plaintiff in error.

*Attorney General*, for the State.

GREEN, J. delivered the opinion of the court.

The plaintiff in error was indicted, in Stewart county, for an assault upon Margaret Buchanan, a white woman, with intent to commit a rape. He was found guilty in the Circuit Court, and appealed to this Court.

1st. The bill of exceptions shows, that when the jury to try the prisoner was being empannelled, Robert Tompkins was called, who stated, that he had married a niece of Brigham's, the owner of the prisoner; that he had formed some sort of opinion in relation to the case; that he had not conversed with any of the witnesses in the cause, nor did he know whether the persons who gave him information on the subject were acquainted with the facts; that the first he had heard of the matter was from one of his negroes. Upon this statement, the court determined said Tompkins to be incompetent to serve as a juror in this cause, to which the defendant excepted. The character of information upon which this juror had formed "some sort of opinion," to use his own expression, was hardly such as to have authorized his rejection, according to the principles stated



[*Heary vs. The State.*]

in the case of *McGowan vs. The State*, (9 Yerg. Rep. 193,) and repeated in *Payne's case*, (3 Hump. Rep. 376.) And, therefore, we are of opinion, that the court would not have erred, had the individual in question been put to the prisoner, as being above exception. But it does not follow, that because the party might have been received as a juror, that his rejection is error, for which this court will reverse the judgment. Certainly, if there was doubt, whether the party summoned had formed such opinion as would render him unfit to be a juror in the cause, the safe course was that adopted by his Honor, the Circuit Judge. The great object of the constitution and the law, is, that an impartial jury may be obtained in every case. The rejection of Tompkins had no tendency to prevent the attainment of this end, for the prisoner, so far as we can see, did not exhaust his challenges before the jury was fully made up, and consequently he obtained an entire panel of his own choice. Furthermore, in a case of this sort, no advantage could accrue to a prisoner, should a new trial be awarded. The only effect of such new trial would be, that the prisoner would be enabled to obtain an impartial jury; but he has already had the benefit of such a jury of his own choice. He has, therefore, suffered no injury, nor would another trial confer any benefit in this respect. It is insisted, that the evidence in the cause was not such as to warrant the verdict.

The girl, who was assailed, states, that the prisoner met her at the spring, two hundred yards from the house, (her father and mother being from home,) and after asking her some questions upon indifferent subjects she became alarmed, and started towards the house, and had gone but a few steps, when he caught her by the back of the neck and choked her down several times; that she cried out, and he left her. No attempt was made to ravish her; no embrace, or word, or action, indicating a wish to have carnal knowledge of her. Two witnesses prove, that when he was told by the Justice, at the time he was first arrested, that he must plead guilty or not guilty, he said, "he took hold of the girl."

From this evidence, if any motive of anger, or illwill could have been shown to exist, we should be clearly of opinion, that

[Henry vs. The State.]

the assault and choaking were referable to that, rather than to the intent to ravish. But there is no evidence of such motive, and the jury were, perhaps, warranted in arriving at the conclusion, that the assault was commenced with an intention to ravish, but which intention was immediately abandoned. Although the verdict in a criminal case will be set aside in this court, upon grounds which would not authorize us to disturb the finding of a jury in a civil cause, yet in all cases, a verdict must have some influence with this court. *Dains vs. The State*, 2 Hump. Rep.; *Kirby vs. The State*, 3 Hump. Rep. And, hence, we would feel scarcely authorized to give a new trial upon this evidence.

3d. But in this record, there is no entry showing that the grand jury returned into open court, with the bill of indictment "a true bill." This court, in the case of *Chappell vs. The State*, (8 Yerg. R. 166,) held, that such entry of record was indispensable to verify the finding of the grand jury. In the case of *Blevins vs. The State*, (Meigs' Rep. 82.) *Chappell's* case, although pronounced to be on the verge of the law, is adhered to as the settled law of the court. These cases have been constantly acted upon ever since.

4th. It is no where shown, in this bill of exceptions, that Margaret Buchanan is a white woman. The act of 1833, ch. 75, sec. 1, declares, that the punishment of death shall be inflicted upon any negro who shall assault a white woman with an intent to commit a rape. To create the offence, it must be shown, that the assault was committed on a white woman, not necessarily by the proof of witnesses, for the exhibition of the woman as a witness before the jury, would perhaps be sufficient evidence to support this charge in the indictment. But when the case comes before this court, it must appear from the bill of exceptions, that the woman on whom the assault was committed was white. See *Elijah vs. The State*, 2 Hump. Rep., and *Grandison vs. The State*, 2 Hump. Rep.

For these errors in the record, the judgment must be reversed.

**TROUSDALE & BUGG vs. DONNELL.**

A judgment was rendered against two, and being void as to one, it was void as to the other.

This is an appeal in error from a judgment of the Circuit Court of Sumner county.

*Trousdale*, for the plaintiff in error.

*Baldrige*, for the defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of debt brought by the defendant in error against Wm. Trousdale and Anselum D. Bugg: so it is in the writ, and so in the declaration. The pleas are in short; "payment and set-off;" "replication and issue;" these pleadings must be referred to the parties as specified in the writ and declaration. But the judgment is against Wm. Trousdale and Henry H. Bugg, and Wm. Trousdale and Henry H. Bugg appeal.

Henry H. Bugg is no party to the suit, except as appellant, and there is nothing in the record from which an appearance on his part before trial can be adjudged; he had the right to appeal from a void judgment, which this is as to him; being void as to him, it is void as to Trousdale, for a judgment is entire, and cannot be good in part and bad in part.

The case must, therefore, be reversed, and remanded for proceedings against the proper parties.

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NOTE.—See 3 Humphreys, page 419.

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When the offence charged, is the passing counterfeit coins, the guilty knowledge of the defendant being in issue, proof that the defendant passed other counterfeit coins of the same character, about the same time, and the circumstances under which they were passed by him, as that witness won them at a gambling house, is competent evidence.

Powers was indicted, in the Criminal Court of Davidson county, for passing counterfeit coins, and was tried and convicted, Turner, Judge, presiding, and sentenced to 3 years imprisonment in the penitentiary. He appealed.

*Sheppard*, for Powers.

*Attorney General*, for the State.

GREEN, J. delivered the opinion of the court.

This is an indictment for passing the counterfeit resemblance of an English sovereign, knowing it to be such. The defendant was found guilty, and appealed to this court.

Upon the trial, Oliver Hughes was introduced as a witness by the State, who testified, that a day or two previous to the time the prisoner is charged with having committed the offence, the witness and prisoner gambled together, and that witness won two pieces of metal resembling gold coins, which the witness thought were genuine gold coins; that the pieces he won looked like those which were exhibited in court, and he thought were the same, and that said pieces of coin were not gold.

The counsel for the defendant insists, that so much of the evidence of Hughes, as relates to the gambling of the prisoner, was irrelevant, and ought not to have been received, its reception having been objected to.

It is certainly true as a general rule, that evidence of other transactions than those charged in the indictment cannot be received; but where knowledge constitutes an essential ingredient in the guilt, this rule is relaxed. In such cases, transactions of a like kind with those charged in the indictment, may be given in evidence. Therefore, in this case, it was clearly competent

[*Deshazo vs. The State.*]

to prove the passing the two pieces in the gambling house. And if competent to prove they were passed by the defendant, it was necessary to state the circumstances under which they were passed, so as to enable the jury to judge of the guilty knowledge. If the witness had been permitted to state only, that he had received these two pieces from the defendant, without explaining in what way, or under what circumstances the jury would have been less able to draw the inferences upon which to found their verdict. Although, therefore, the gambling, as a substantive transaction, without any connection with the base coins, could not have been given in evidence; yet, as here introduced, it forms a part of the transaction of passing the coins, and as such, may properly be spoken of in detailing that transaction. The stake and the event of the game constitute the contract by which the coins were passed, and may be spoken of as any other contract by which counterfeit notes or coin may be passed.

Let the judgment be affirmed.

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NOTE.—See *Peck vs. The State*, 2 Hump., *Stone vs. The State*, ante.

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### DESHAZO vs. THE STATE.

The act of 1841, entitled "an act to suppress illegal voting," authorizes grand juries to bring before them, by subpoena, the judges, inspectors, clerks and officers of elections, for the purpose of presenting offences against the act. It does not extend the power to the jury to bring forward any witnesses except those specifically named in the act.

*Nicholson and Thomas*, for the plaintiff in error.

*Attorney General*, for the State.

GREEN, J. delivered the opinion of the court.

The plaintiff in error was presented by the grand jury of Hickman county, for betting on an election. To this presentment, the defendant pleaded in abatement, that the presentment was not made upon the knowledge of any one of the grand

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jury, nor upon the testimony of any one of the judges, inspectors, clerks, or officers holding the election, but upon the information of Samuel H. Williams, a person sent for, and brought before the grand jury; he being neither judge, inspector, nor officer holding said election. To this plea the Attorney General, on behalf of the State, demurred. The court sustained the demurrer, and the defendant appealed to this court.

This case raises the question, whether the act of 1841-2, ch. 31, (session acts, p. 29,) authorizes a grand jury to send for witnesses to give evidence concerning the betting on elections; and whether the witnesses they may call before them for this purpose, are restricted by the 14th section, to judges, inspectors, clerks and officers holding the election.

The act under consideration, is entitled "an act to suppress illegal voting." Its provisions relate to the qualification of electors; duty of officers holding elections; penalty for violation of its provisions, &c. The 14th section makes it the duty of grand juries, to present all offences in violation of the act. And to this end, it is made their duty to apply for subpoenas for the judges, inspectors, clerks or officers holding such elections as witnesses, or any one of them, whom they may believe has any knowledge of such offence.

This section was evidently framed in reference to those offences which the act contemplated might be committed in conducting the elections. Hence the limitation of the power of the grand jury to send for witnesses. It was thought, that if any of the offences, referred to, had been committed, the persons specified would most probably be able to prove it. There was no need, therefore, of extending the power.

The provision in the latter part of the section, whereby it is made unlawful for any person, against whom a witness may have been summoned without his own procurement, to give evidence, to be thereafter summoned, or used as a witness before any grand jury, or petit jury, to give evidence against such person, when on trial for any offence under this act, cannot extend the previous provisions of the section, so as to authorize, by construction, the grand jury to send for persons, other than those mentioned in the former part of the section.

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The 17th section provides, "That whosoever shall bet on any election in this State, shall be guilty of a misdemeanor, and shall be indicted or presented therefor, under the provisions of this act."

Those provisions are to be found in the 14th section, and we have seen, they do not give the grand jury an unlimited license to send for witnesses.

How much soever, we may desire to suppress the immoral practice of betting on elections; interfering as it does with the freedom of the elective franchise; we cannot, in the administration of the law, go beyond the point to which the legislature has gone in its enactment.

It will not do to say, that the reason for restricting the grand jury to a particular class of witnesses in relation to other offences mentioned in the act, does not apply to this, of betting, and, therefore, we ought to effectuate the supposed intention of the legislature, which must have been, that any person whatsoever, should be called in by the grand jury to give evidence of this offence.

This may have been the meaning, and certainly it is most reasonable that they should so have provided; but we have no means of knowing the intention of the law makers, but by the sense of the language they employ.

This act is highly penal, and must, therefore, be construed strictly, inasmuch as betting on elections is not technically gaming, and, therefore, not within the operation of the law, which requires, that the statutes for the suppression of gaming shall be construed remedially. See *Smith vs. The State*, Meigs' Rep. 99.

The judgment must be reversed, and the cause remanded.

**WHITEHEAD vs. THE STATE.**

An accessory cannot be tried without his consent before the conviction of the principal, unless they are tried together.

Abel Little was shot about twelve o'clock at night, in a still-house belonging to him, which was situated on the highway, in Bedford county. He died instantly. The assassin fled. Whitehead was suspected, in consequence of the hostility which existed between him and Little and other circumstances, of being the perpetrator, arrested and indicted.

The indictment contained three counts. The first charged him as principal. The second charged him with being present, aiding and abetting the commission of the offence by some person, to the jurors unknown. The third charged him with having aided, counselled, hired and commanded the said person, unknown to the jurors, the said felony and murder to do and commit.

The defendant pleaded not guilty to the indictment, and at the August term, 1843, Judge Caruthers presiding, the case was submitted to a jury without objection on the part of the defendant.

The testimony was heard, and the court having charged the jury, without exception being taken thereto, they returned the following verdict:

"The jurors upon their oath do say, the defendant is not guilty in manner and form as charged in the first and second counts in the indictment, but that he is guilty in manner and form as charged in the third count; that some person, unknown, was guilty of murder in the first degree, in manner and form as charged, and that the defendant did wilfully, maliciously, premeditatedly, deliberately and feloniously procure said unknown person to perpetrate said murder."

The defendant moved the court to grant him a new trial. This motion was overruled. A motion in arrest of judgment was made and being overruled, and judgment of death pronounced on the defendant, he appealed in error to the Supreme Court.



[Whitehead vs. The State.]

*Thomas H. Fletcher*, for the plaintiff in error.

The defendant has been convicted of the offence of accessary before the fact to the murder of Abel Little; and it does not appear that the principal has been tried and convicted, or that the defendant ever consented to be put on his trial. This judgment is, therefore, erroneous and should be reversed upon well settled principles.

A principal in the first degree, is one who commits the deed with his own hand. 1 Russ. C. 21; 1 Chitty C. Law, 256-9. A principal in the second degree is one who is present, aiding and abetting at the fact, or ready to give assistance if necessary. 1 Russ. on Cr., 21. An accessary before the fact in murder is one who being absent at the time of the offence committed, doth yet procure, counsel, and abet another to commit the murder. 1 Russ. 29, 432.

Whithead is not indicted here as principal in either degree. He is not charged with being present; but the offence with which he stands charged, comes precisely within the definition of an accessary before the fact. It is charged, that before the commission of the murder, he procured the unknown person to do it; and the verdict of the jury is only the finding of a crime, which amounts precisely to that of an accessary before the fact in murder. See 2 Chitty, 4 & 5.

Our statute of 1829, ch. 23, sec. 62, p. 306, Nich. & Car., defining what constitutes a principal, makes no change in the common law. 1 Russ. C. 22-3-9, & 30; 1 East, P. C. 362.

An accessary before the fact cannot be tried, until after the principal has been tried and convicted. A principal and an accessary may be indicted jointly, and then they may be tried at the same time, and if the principal is convicted, the accessary may also be convicted on the same trial. Or the principal may be first tried, and if convicted, then the accessary may be tried; but the acquittal of the principal operates as a discharge of the accessary. Or they may be indicted separately, and then the principal must be first tried and convicted, and then the accessary may be tried. But by the common law, under no circumstances, could an accessary before the fact be tried, until after the conviction of the principal. 1 Russ. 21-36; 1

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Hale, 623; 2 Hawkins, P. C. ch. 29, sec. 45; Foster, 360; 4 Black., 40; 1 Chitty, 266-272; 16 Mass. R. 423; 3 Mass. 126; 2 Burr's Trial, 440; 7 S. & Rawle, 491. And this rule of common law still prevails in Tennessee.

By 7 George IV, ch. 64, in England and by special statutes in some of our own States, an accessory before the fact may be tried, convicted, and punished before the trial and conviction of the principal; but no such law has been enacted in Tennessee.

The prisoner is not bound to plead that his principal has not been tried, but may put in the plea of not guilty; and unless the State proves the conviction of the principal, the accused must have a verdict of acquittal. 1 Russ. 29; 10 Pick. 477; Archb. 298; 3 Mass. 126.

*Attorney General*, for the State.

*Ready*, for the plaintiff in error. An accessory cannot be put on his trial until the principal has been convicted, or is put on his trial with the supposed accessory. See *The Commonwealth vs. Phillips*, 16 Mass. R. 423; *The Commonwealth vs. Andrews*, 3 Mass. Rep. 126; Archbold 4 Am. Ed. 7 & 8, 147, 148; 1 Russ. 29; *Rex vs. Russell*, 1 Mod. C. C. 356.

The defendant is entitled to be discharged by this court; because he has been indicted and acquitted as principal; and cannot, therefore, be indicted as accessory before the fact. 1 Russ. 38; 1 Hale, 625.

TURLEY, J. delivered the opinion of the court.

At the August term, 1843, of the Circuit Court of Bedford county, the prisoner was arraigned and tried upon a bill of indictment for homicide. The indictment contains three counts. The first, charging him with commission of the offence as principal in the first degree. The second, charges the offence to have been committed by a person unknown, and that the prisoner was present, wilfully, deliberately, maliciously and premeditatedly, aiding, abetting and assisting the unknown per-

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son, the said felony and murder to commit. The third, charges the offence to have been committed by some person unknown, and that the prisoner did feloniously, wilfully, deliberately, maliciously and premeditatedly incite, move, procure and counsel, hire and command the said unknown person, the said felony and murder to do and commit.

Upon the trial, the jury returned a verdict, that the prisoner was not guilty upon the 1st and 2d counts in the indictment, but was guilty upon the 3d; upon which judgment of death was given against him, to reverse which he prosecutes his writ of error to this court. This verdict and judgment acquit the prisoner of the charge of having committed the murder himself, or of having been present, aiding and abetting its commission. The court is, therefore, freed from the necessity of examining the proof in order to ascertain the truth or falsity of these allegations.

The only question for our examination and consideration is, whether the judgment pronounced by the Circuit Judge, can be maintained upon the third count in the indictment; and this is a question of law and not of fact, as it is presented. We do not, therefore, deem it necessary or proper to enter into any investigation whatever of the proof adduced on the trial, and embodied in the record.

The 3d count of the indictment charges the prisoner as an accessory before the fact and no more; this is so clearly so, that to enter into an argument to prove it, would be a waste of time. It charges the offence to have been committed by a person unknown; upon it the prisoner was put upon his trial, without his previous consent, and before the conviction of the principal. Can a conviction thus obtained, be enforced by a judgment of the court? We think most clearly not.

It is well settled by the common law, that an accessory cannot be put upon trial without his own consent previous to the attainder of his principal, unless they be jointly tried. Archbold in his Summary of Pleading, and Evidence in Criminal Cases, page 518, says; "Formerly an accessory could not without his own consent, unless tried with the principal, be brought to trial until the guilt of his principal had been legally ascer-

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tained by conviction." Chitty in the 1st volume of his Criminal Law, page 180, has the same in substance: he says; "Formerly the accessory could never be tried without his own consent before the conviction, or outlawry of the principal, unless they were tried together." And the truth of this proposition is fully sustained by 1st Hale, 621; Hawkins' b. 2, c. 29, sec. 34; 4 Black. Com. 39; Com. Dig. Justice, p. 2; and the reason of this rule is obvious. There can be no accessory to an offence, unless an offence has been committed, and it will not do to say, that the goods of another have been stolen; that a house has been broken, or a homicide committed; all this may be, and yet there be no larceny, no burglary, no murder; for the commission of the offence cannot be predicated of the fact, until it has been judicially announced upon legal investigation. And this investigation, upon principle, cannot be made, except upon a charge against the perpetrator, who is supposed to be best acquainted with the circumstances attending the transaction, and the best qualified to make the proper defence.

The principle has been recognized, as above stated, in the United States, as far as we have had an opportunity of ascertaining.

In 3d Mass. Rep. 126, *Commonwealth vs. Thos. Andrews*, it is held, that "an indictment against one for feloniously receiving stolen goods, cannot be maintained, unless there is evidence that the principal has been convicted. If the accessory plead to the indictment and suffer a trial without demanding the previous trial and conviction of the principal, it is no waiver of this right. No assent can be implied from his submission to the course directed by the Attorney General in the court. In criminal cases, an express relinquishment of a right should appear before the party can be deprived of it. Here is no such relinquishment, but merely a silent submission, which might have arisen from ignorance at the time, that such right existed." In the case of *The Commonwealth vs. Phillips*, 16 Mass. Rep. 426. Upon this subject, the Chief Justice Parsons, says, "the Justices have carefully examined the books upon the subject, and are unanimously of opinion, that by the common law, an accessory cannot be put upon his trial, but by his own consent,

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until the conviction of the principal. And the reason of this rule is very plain. If there is no principal, there can be no accessory; and the law presumes no one guilty until conviction. One only doubt arose, from the peculiar circumstance in this case, that the person charged as principal is dead, and can never be tried. If he were alive, and on trial, it is possible he might establish his innocence, strong as the evidence has appeared in support of his guilt. In such case, the prisoner could not be found guilty." This principle of the common law, has been modified in England by various statutes. The statute of 1st Ann, ch. 9, sec. 2, enacts, "that whosoever shall buy or receive stolen goods, knowing them to be stolen, may be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not convicted." And this provision is extended by 22d George III, ch. 58, sec. 1, to cases of petit larceny, and by it all accessories in grand larceny are liable to be indicted as such, at any time before the conviction of the principal. The statute of 7th George IV, ch. 64, enacts, "that if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any statute or statutes, made or to be made, the person so counseling, procuring, or commanding, shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact, to the principal felony, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall, or shall not have been previously convicted, or shall, or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact, to the same felony, if convicted as an accessory may be punished." The provisions of none of these statutes are in force in this State; the question as to the propriety of introducing them, is for the consideration of another department of the State, the legislature. Our statute of 1829, ch. 23, has made no alteration in the principle of the common law; it provides in sec. 4, "that every person convicted of the crime of murder in the first degree, or as accessory before the fact to such crime, shall suffer death, by hanging by the neck." This only

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specifies the punishment to be inflicted upon the accessory, but does not change the relation, as established by the common law, between the principal and the accessory, or the mode in which the prosecution shall be conducted.

Upon the authority of the case of the *King vs. Walker*, 3 Campbell, 264, it was supposed by the Attorney General, in argument, that where the bill of indictment against the accessory, states, that the felony was committed by a person, to the jurors unknown, the accused might be put upon his trial. But on an examination of this case, we find it warrants no such supposition. The question in that case, was not, whether the accessory could be put upon trial before the attainder of his principal, but whether a bill of indictment could be sustained, which charged the felony to have been committed by a person unknown; and the Justice, L. Blank, who tried the case, said, it could not, if it appeared that the principal felon was a witness before the grand jury. Now, it never has been doubted, that an accessory may be indicted before the conviction of his principal, and the case from 3d Campbell, only shows, negatively, that an indictment, charging the felony to have been committed by a person unknown, where the fact is so, can be maintained. But, if it be maintainable, it still must abide in the court for trial in the same way, as if it had charged the person by name who committed the felony; that is, until the person who committed the offence, as principal, can be ascertained and convicted. It would be strange, indeed, to hold, that an accessory cannot be tried till after the conviction of the principal, where he is known, but may be where he is not; causing, thereby, two uncertainties to overcome a difficulty, which one had thrown in the way. Upon the whole, then, we reverse the judgment of the Circuit Court, and remand the prisoner.

## THE STATE vs. PARRISH.

The act of 1837, ch. 125, sec. 2, subjecting executors, administrators, and guardians to indictment, in the event of a failure, upon notification, to settle their accounts once in each year, before the Clerk of the County Court, does not apply to cases where a final settlement has been made of all the estate in their hands.

This indictment was found by the grand jury of Dickson county, against the defendant, Parrish, administrator of W. Parrish, deceased, and an agreed statement of facts submitted to the court, and a judgment rendered in favor of the defendant, from which Johnson, Attorney General, appealed on behalf of the State.

*Attorney General*, for the State.

*Shackleford*, for the defendant.

REESE, J. delivered the opinion of the court.

This is an indictment under the act of 1827, ch. 125, sec. 2 and 3, for failing to settle as administrator with the County Court Clerk, after having been summoned to appear and make such settlement.

In the case agreed, it is admitted by the parties, that the defendant administered on the estate of Wyatt Parrish, deceased, in 1823; that he filed an inventory of the estate in 1823, and an account of sales in 1824. It is also agreed, that commissioners were appointed, and a settlement was made with them in 1826, and that in 1828 other commissioners were appointed, and a settlement in full was made with them, which was received by the County Court, and recorded at March term, 1829, when there appeared to be in defendant's hands, as administrator, the sum of \$95 75, which sum has been distributed, but the evidence of the distribution does not appear of record. The County Court Clerk summoned the defendant to appear before him and settle his administration accounts in 1842, which the defendant neglected to do more than thirty days after service of the subpoena. The Circuit Court, upon these facts,

[The State vs. Parrish.]

gave judgment for the defendant, and the Attorney General appealed to this court.

By the act of 1827, ch. 125, sec. 2, (pamphlet acts, 191,) it is provided, that it shall be the duty of the County Court Clerks, "by subpoena, to compel executors, administrators and guardians, to come before them once in every year, for the purpose of settling their accounts: *Provided*, That executors and administrators shall not be compelled to make settlements until after two years shall have elapsed from their qualification as such." The third section provides, "that if any executor, administrator, or guardian shall neglect to appear before the Clerk of his county, for the space of thirty days after the service of a subpoena to settle his accounts," he shall be subject to indictment. And that the Attorney General shall prefer such indictment *ex officio*, without a prosecution.

This statute is most salutary in its provisions, and will be of great benefit to the community, if properly executed.

Few persons who take upon themselves duties of executor, administrator, or guardian, have at the time they enter upon the office, a corrupt purpose to embezzle the estate which is committed to them. But they neglect to settle their accounts promptly, and the laws heretofore have been so inefficient for compelling such settlements, that persons thus situated were tempted to retain the estate in their hands for their private benefit; until mixing it with their own, and accustomed to its use, the evidence of their liability having faded by lapse of time, they do not resist the temptation to defraud those for whose benefit the estate was committed to them.

To remedy this evil the act of 1837, now under consideration was passed. It was believed that a settlement promptly made, would be likely to bring to view the true state of the accounts, and situation of the estate; and when a final adjustment of the accounts could not be had at the end of two years, (as is most generally the case,) that a frequent repetition of such settlements would effectually remove all temptation to the commission of frauds, or embezzlement of the property.

To effect the desirable ends of preserving alike the property of infants and deceased person's estates, on the one hand, and



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the morals and integrity of executors, administrators, and guardians on the other, we think this law is admirably adapted. But we do not think it was intended, to apply to any case, where a final settlement had been made, according to the law as it existed at the time of such settlement, or to be continued annually, after a final settlement of all the estate in the hands of the party, shall be made under this act.

We, therefore, think there is no error in this record, and affirm the judgment.

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PILLOW vs. ALDRIDGE et al.

Where a bill of interpleader is filed, a Court of Chancery will not actively interfere to dispose of a fund, except in favor of one who, either from proof or from a *pro confesso* judgment, appears best entitled.

This is an appeal from an order in Chancery at Columbia, Bramlitt, Chancellor, presiding.

*Nicholson*, for complainant

*Dew*, for defendant Aldridge.

RESE, J. delivered the opinion of the court.

Harrington, as the creditor of Wood, filed a bill to recover the amount of a note due from Winston to Wood. William K. Hill filed an attachment bill for the same purpose; and it being known to G. J. Pillow, who had the collection of said note, that Aldridge also claimed the proceeds of said note by assignment, he filed a bill of interpleader, making Aldridge a party defendant, who answered, exhibiting his deed of assignment. But the rights of the parties were never adjudged or decreed upon; for Harrington died, and having no administrator in time, his bill abated. Hill's bill being an attachment bill, and the affidavit defective, was dismissed on technical grounds,

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and Aldridge produced no further proof to show his title to the proceeds of the note, than the mere deed of assignment exhibited with his answer. Under these circumstances, Pillow having paid the funds into court, the Chancellor ordered that they remain for the present with the Clerk and Master. Aldridge has appealed.

We affirm the decree of the Chancellor, because it was not made to appear to the Chancellor, that Aldridge had the better right, and the court should not actively interfere to dispose of the fund, except in favor of one who appears, either from proof taken or from a *pro confesso* judgment suffered, to be best entitled. The latter was the case in Richards and Slater, 6 J. C. R. 444, One defendant averred and proved his title; the other defendants permitted the bill and the answer of the co-defendant to be taken *pro confesso*. Upon this state of the facts on the record, a final and conclusive decree as the matter in dispute will be rendered. But far otherwise here. The rights of the parties to the fund, could not be conclusively determined in these cases.

Let Aldridge's appeal be dismissed, and such decree as has been rendered be permitted to stand, and the case be remanded.

*JIM, a slave, vs. THE STATE.*

To the jury belongs the province of judging of the credibility of witnesses and ascertaining the truth of contested statements; yet this must be done by a deliberate examination of the weight of the respective characters of the witnesses and the consistency and probability of their statements, and not by experiments, such as sending the constable out of the room, closing the door, and then talking, with a view to ascertain whether their voices could be heard out of doors, or running with a view to ascertain whether their tracks would be longer or shorter than when walking, and the like.

Isaac, a slave, was shot in his cabin, in Dekalb county, about 12 o'clock at night, whilst asleep on the floor, and died of the wound. Jim, from his previous threats to commit the deed, and other circumstances, was arrested as the perpetrator, indicted, and at the April term, 1843, of the Circuit Court of Dekalb county, Judge Caruthers presiding, he was found guilty by a jury. A motion was made for a new trial, on two grounds: 1st, that the evidence did not justify the verdict; and 2d, on the ground of misconduct on the part of the jury.

The defendant offered the affidavits of jurors to sustain the alleged impropriety of conduct. It had appeared in evidence, that the shoes of Jim were about half an inch longer than the tracks which left the house where Isaac was shot and which were discovered next morning after he was shot. These affidavits stated that the jury believed that the tracks of a man running were shorter than when walking; and for the purpose of ascertaining the truth of the assertion they went out and measured the tracks of a juror walking and running, and found the fact to be so; and that this experiment, confirming their previously entertained opinion, removed the difficulty they felt in reconciling the discrepancy between the length of the tracks and the shoes of Jim.

The witnesses Beck and Nancy swore, that at the time the gun fired which killed Isaac, Jim was in a cabin which adjoined the cabin in which they were; that they heard him, before the firing of the pistol, talking, and knew his voice, and that one of them went into the room and found him there.

The jury disregarded their testimony; and one circumstance which induced them to disregard it, was the belief that when the door of the adjoining cabin was closed, the talking of Jim, in

[Jim vs. The State.]

an ordinary conversational tone, could not be heard; and to test the truth of this opinion, they sent out the constable, closed the door, and talked louder than the usual conversational tone. The constable came in and reported that he could not hear them. This experiment gave strength to their convictions; and after a disagreement of several days, they returned a verdict of guilty.

The court refused to set aside the verdict, and judgment of death was entered up against the defendant, from which he appealed.

*Samuel Turney*, for the plaintiff in error.

*Attorney General*, for the State.

TURLEY, J. delivered the opinion of the court.

The prisoner was indicted in the county of Dekalb, for the crime of murder, convicted and sentenced to death, and he prosecutes an appeal to this court.

The question of reversal rests upon the character of the proof adduced on the trial and the conduct of the jury in the mode adopted by them of arriving at the result of this verdict as it is exhibited in affidavits of three of the jurors.

The testimony is most of it entirely circumstantial, perhaps all of it, except a portion of negro Linda's, who says the prisoner told her he had shot the deceased, which we think, upon the whole view of the case, entitled to but little weight.

It appears, that the prisoner and a negro named George, the husband of witness Linda, were lurking in the neighborhood, both armed, both having threatened to kill the deceased, who they suspected of being employed to arrest them. On the night the murder was committed, Linda swears, that the prisoner came to the place of her residence early; stayed there till bed time; she asked him if he would lie down, which he declined; that she went to bed and left him there; that she waked several times during the night and always saw him.

In addition, two other witnesses, Beck and Nancy, both belonging to the master of Linda, swear positively that the prison-

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er was in the house of Linda at the time the gun was fired that killed deceased; that they heard the gun, and Beck says, that she afterwards heard prisoner talking with Nancy in Linda's house; and Nancy says, that after the gun was fired she went into Linda's house, found prisoner asleep, waked him, and conversed with him: powerful proof; conclusive proof, if true. But the jury chose to believe Linda, and to disbelieve Beck and Nancy. If they had done this upon a proper exercise of their judgment, the question would have been presented in a very different point of view from what it is; but this was not done. Instead of weighing the credibility of these witnesses by the legitimate mode of general weight of character and probability of their statements, they have chosen to shut themselves in their room, send out the constable, talk to each other in a louder tone than common, and then enquire of him if he heard them; and upon his reply in the negative, they have considered it as conclusive, that Beck and Nancy could not have heard the prisoner talking in Linda's house. This mode of arriving at the truth of testimony cannot be permitted; it is too vague and uncertain. A different intonation of voice, a difference in the structure of the rooms, would destroy its virtue as a test; and besides, they had to take the word of the constable as to the fact whether they were heard.

The circumstances of the case, with the exception of the tracks from the place where this murder was committed and the shoe of the prisoner, which was produced on the trial, in comparison therewith, apply nearly, if not quite as well, to George as the prisoner. Both were apprehending that the deceased had been employed to arrest them; both had threatened to kill him; both were in the neighborhood, and had plenty of opportunities to carry their designs into effect.

The shoe which was produced on the trial against the prisoner, was half an inch longer than the tracks: this was another difficulty the jury found much in their way; but supposed that in running, a track might be shorter than the shoe: they and their constable again try an experiment by running, and find their own tracks half an inch shorter than their shoes; and a verdict of guilty is returned.

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Independent, then, of the doubtful and uncertain character of the proof introduced to establish the guilt of the prisoner, we cannot permit verdicts which have been obtained like this, upon uncertain and dangerous experiments, instead of a calm, deliberate and philosophical examination of the proof, to stand where the lives of individuals are at stake.

The judgment is therefore reversed, and the case remanded for a new trial.

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See *Kirby vs. The State*, 3 Humphreys.

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### WHITE vs. BROWN.

A court of law can hear testimony to establish the relation of principal and surety in a sealed instrument, when a party claims his discharge under the act of 1825 as a surety on the ground that the judgment obtained against him as a surety was stayed without his joining in with the principal in procuring the stay.

White recovered four judgments before a Justice of the Peace of Giles county, against W. R. Brown and I. E. Brown. These judgments were obtained on obligations made to White by the Browns. Both appeared as principals on the face of the instruments. W. R. Brown procured Harris to stay execution: Ira did not join in this application to Harris. It does not appear that Harris was aware of the fact that I. E. Brown was only a surety. The stay expired, and White procured the issuance of executions on the judgments. W. Brown had by this time become insolvent. Ira E. Brown applied for and obtained writs of *certiorari* and *supercedas*, returnable to the Circuit Court of Giles county, on the ground that he being a surety and the judgments having been stayed without his having joined the principal in procuring the stay, he was thereby exonerated and discharged.

The cause came on for trial at the August term, 1843; Dillahunty, Judge, presiding; and was submitted to a jury. The defendant Brown offered evidence to show that he was a surety in the obligations, and not a principal. This was rejected.

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The jury rendered a verdict in favor of the plaintiff White. A motion for a new trial was made, and overruled, and judgment rendered, from which defendant appealed.

*N. S. Brown*, for plaintiff in error. The principal question in this case is, as to the right of the defendant to obtain the redress sought by him, in a court of law.

In other words, had the Circuit Court the power under the acts of 1825, ch. 82, sec. 1, and of 1842, ch. 136, sec. 1, to grant the relief therein provided for sureties, where the note or bill single is under seal, and the fact of suretyship does not appear on the face of the paper.

It is insisted for the defendant, that the legislature intended by these statutes, to furnish a cheap and easy mode of redress for sureties, in all cases coming within their purview; and that such redress could be had in a court of law, whether the suretyship appeared on the face of the note or not. The taking of the stay without the consent of the surety, was like a new contract with the principal; and would the right of the surety in such case to avail himself of it in a court of law, be questioned? Why not allow him to show that he is surety, as well as any other fact, in discharge of his liability?

These acts of assembly form but a part of a general system, adopted from time to time, for the benefit of sureties, and should all be construed *in pari materia*: and by the act of 1809, ch. 69, sec. 2, the fact of suretyship, as therein provided, may be ascertained by a jury, where it does not appear on the face of the note, &c. Now, will not subsequent acts upon the same subject be held to embrace the same provision, where they have nothing inconsistent with it? See Cooke's Rep. 268; 2 Tenn. 173, 373, 392 and 357; Cooke's Rep. 330. See also Bac. Abr. 4th vol. title Statute, letter I, and also Kent's Com. vol. 1, pages 440 to 469, inclusive.

The language of the acts of 1825 and 1842 are general and comprehensive, and provide that when any person or persons shall be surety for any debtor or debtors, &c. Now, these acts have reference to liabilities of small denomination, such as are incurred on debts within the jurisdiction of Justices of the

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Peace, and a large portion of them under the sum of fifty dollars, and of course not within the jurisdiction of a Court of Chancery. On all cases, therefore, of this last class, if the opinion of the court below be the law, no relief can be had. The legislature surely, in passing these statutes mainly for the benefit of sureties upon small debts, could not have overlooked this obvious difficulty, and therefore intended that relief in all cases should be had in a court of law; otherwise the statutes themselves will, in many instances, be rendered wholly nugatory. This court will give effect to the acts of the legislature, if by any possible intendment it can be done. It is the first principle in the construction of statutes, that an adherence to the letter must be abandoned, if by such adherence the leading or primary objects of the legislature are to be defeated. 2 Ten. R. 357; Bac. Abr. 4th vol. statute, letter (I); where it is laid down, "that such construction ought to be put upon a statute as may best answer the intention which the makers had in view." "The intention of the makers of a statute is sometimes to be collected from the cause or necessity of making it." And in 1st vol. Kent's Com. page 463, it is laid down, "that whenever a power is given by a statute, every thing necessary to the making of it effectual, or requisite to attain the end, is implied."

"When an action founded upon one statute is given by a subsequent statute in a new case, every thing annexed to the statute by the first action is likewise given."

"A statute lately made may be holden to be within the equity of a statute made long since; and if a thing contained in a subsequent be within the reason of a former statute, it shall be taken to be within the meaning of that statute." See Bac. Abr. (Statute.)

For all these reasons, it is insisted that the Circuit Court erred in excluding evidence of suretyship on the part of the defendant, and that the relief sought by the defendant is properly attainable in a court of law.

*Wright*, for the defendant in error. Ira E. Brown having executed sealed instruments apparently as principal, can he be



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heard in a court of law to prove otherwise. Is he not estopped in a case of this sort to do this? I contend that he is, and that the ruling of the Circuit Judge was correct. Theobald on Principal and Surety, top page 69, 77; *Deberry vs. Adams*, 9 Yer. Rep 42.

In *Rees vs. Benington*, 2 Vesey Junior, 531, it is said by the Lord Chancellor, "the form of the security forces these cases into equity." *Maxwell vs. Connor*, 1 Hill's Chancery Reports, 14, 16, 17 et sequitur. It is clear, then, from these authorities, that though the defence of the surety was a *legal one*, yet at common law, where all the parties to a *sealed instrument appeared as principals*, the surety was estopped to show the fact of suretyship. The act of 1825, ch. 82, Nich. & Car. Rev. p. 655, does not alter this principle, or interfere with this rule. It merely provides: "When any person or persons may be surety for any debtor or debtors, and said debtor or debtors and sureties may be sued and judgments rendered against them, if any person or persons shall stay the same, &c. such person or persons, so replevying, shall be liable, in default of the principal debtor, to pay the debt and costs of said judgment; and the first surety shall be exonerated therefrom, unless the principal debtor and surety in the replevy shall both become insolvent," &c. Now, how is the *fact of suretyship* to be ascertained? The act does not say it shall or may be in a court of law; nor does it say in what manner it is to be arrived at. Does it not follow, therefore, that the fact of suretyship is just where it always was, and to be ascertained in the same way? The act of 1820, (1 Haywood & Cobb's Rev. p. 208,) is in substance the same with the act of 1825; but the construction given this law in *Elders vs. Johnston*, (Peck's Rep. 204,) in 1823, induced the legislature to pass the act of 1825. Previous to these statutes, the surety, in a case like this, had no relief. Their only effect was to announce a new principle, or rather a new case, in which the surety was to be exonerated. It was a mere addition by statute of one more case or ground to the many others before established, in which the surety was to be discharged. Suppose a statute were to announce, that mere delay to sue on the part of the creditor should discharge the surety, would this al-

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ter or change the ancient or common law mode of ascertaining the *fact of suretyship*? Or, suppose the courts, by a system of judicial legislation, were, after a while, to arrive at the conclusion, that in such a case the security ought to be relieved, would not that relief have to come in the same manner as theretofore? It may be asked what is to be done with the case of a surety to a contract under fifty dollars, who cannot go into equity? It might be sufficient to delay an answer, until the case actually occurs. And we might say, if the legislature fail to provide a remedy, it is no reason why the courts should do what it has omitted. For the County Court once had chancery jurisdiction in cases under fifty dollars; (act of 1816, 2 Scott's Rev. 207 and 208,) and this was taken away by the act of 1817, (2 Scott, 365,) and vested in no other tribunal.

But we answer, first: there are now almost an indefinite number of cases, where relief ought, upon principle, to be had, yet cannot, because the demand is under fifty dollars, and the surety here will be no worse off. Secondly: this will only be the case where the suretyship rises from a *sealed instrument and the fact does not appear upon the paper*. For in all notes, bills and simple contracts, this fact can be proved and the defence therefore may be at common law; and in a bond too, if the surety will take the pains to make the *suretyship apparent* upon the paper.

2. I contend, that Harris does not become liable before Ira E. Brown, unless he knew, at the time he stayed these debts, that the latter was only surety of William R. Brown; and that it devolves upon Ira E. Brown to show this by satisfactory proof. A principle of this sort has been held to apply in relation to contracts of delay, &c. between the creditor and principal debtor, without the assent of the surety, where the fact of suretyship was unknown to the creditor; and in such a case the surety is not released. And no reason is seen why the same principle does not apply here. *Neimcewicz vs. Ghan*, 3 Paige, 614, 651. It is very apparent Harris became stayor upon the faith and credit of both Ira E. and W. R. Brown, and especially that of the former. He did not bind himself until he examined the bonds and saw that both were principals in their face.

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REESE, J. delivered the opinion of the court.

White obtained several judgments against William R. Brown and Ira E. Brown, before a Justice of the Peace, upon claims evidenced by bills single. One Robert S. Harris, at the instance and request of W. R. Brown, but not at the instance or request of Ira E. Brown, became bound in all the judgments, as stayor, or surety for the stay of execution. Ira E. Brown was in fact surety only in all the bills single upon which the judgments were rendered; but this did not appear upon the face of the instruments sued on, and the stay surety did not know whether he was principal or surety merely. The act of 1820, ch. 24, sec. 1, Hayw. & Cobbs, 208, provides, that where "one shall stay a judgment rendered against principal and sureties, without the request or consent of the sureties," such stayor shall be liable before such sureties. Upon this section, the Supreme Court held, in a case reported in Peck's Rep. that "without consent" implied dissent, in order to postpone his liability to that of the second surety. Whereupon, the legislature, in 1825, ch. 82, sec. 1, to clear all doubts as to their meaning in 1820, provided that the liability of the first sureties shall in all cases be postponed to that of the surety stay, unless such first surety should have specially joined with such debtor in procuring such stay or replevy. The object of these statutes is very apparent: it was to settle a question of security upon just principles between persons standing in the same general relation to the debtor, and to prevent the practical infliction of great wrong upon sureties, by the operation of the law itself granting stay of execution.

A debtor in failing circumstances and his solvent sureties are sued. The replevin surety risks nothing, if his liability is postponed to that of the judgment sureties, and after the stay is out, they are compelled unfairly to pay the judgment, because in the mean time the principal has failed altogether. The statute intended to prevent this; but by what remedy? The principle being declared, and the parties generally knowing their own relations to each other, as also the judicial and ministerial officers, practical difficulty would not often arise. But if it should, a supersedeas, it is admitted by the counsel of White,

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or Harris, in a court of law, will be the proper remedy, where the relation of surety appears upon the face of the instrument. But where it does not so appear, they allege that this is no remedy at law; if not, there would be none in equity, in a large majority of cases, as jurisdiction stood in 1820; the minimum limit of chancery jurisdiction being fifty dollars, and that being the maximum limit as to most cases before a Justice.

It is most obvious, that such was not the legislative will. The court of law, by the intervention of a jury, could adequately supply the remedy. It was not an enquiry to impeach the consideration of the contract, which would be necessary, but to ascertain the relation of principal and surety. That power had been given to the legislature, to be exercised in the most summary manner, in 1809, and also in the year before. It is a mere matter of fact; that ascertained, the statutes determine the right; and that fact a court and jury can ascertain as well as a court of chancery. The stayor, besides, cannot be injured; he knows who requests him to stay; such are liable to him: if any request him not, they are liable to him, provided they are principal debtors; but if sureties, they are not liable; that risk he takes upon himself, and that risk it is proper he should take upon himself.

The Circuit Court, therefore, was in error, in rejecting the evidence to prove to relation of surety on the part of Ira E. Brown.

Let the judgment be reversed.

## MOORE vs. GREEN.

1. The answer of a garnishee is conclusive; and if it be imperfect, the court, upon interrogatories, will compel him to make an amended answer.
2. Where a garnishee answers, that he executed a bill single or a note, but does not state who is the owner, no judgment can be rendered against him, because he does not state that he is indebted to the debtor of the attaching creditor.
3. The facts stated in the answers of several garnishees cannot be put together, to make out a case of liability against one of them. The liability of each rests on his own answer.

The transcript of the record of a judgment rendered in the Circuit Court of Davidson county, in favor of James and Sarah Green, against Moore, was filed in the office of the clerk of the Supreme Court, and assignment of errors filed and writ of error prayed.

*Bell and Gorin*, for the plaintiff in error.

*Fogg and Ewing*, for the defendants in error.

TURLEY, J. delivered the opinion of the court.

James and Sarah Green having obtained a judgment against one Edmond W. Goodrich, caused an execution to be issued thereon: upon this execution, the sheriff returned *nulla bona*, and that he had summoned James D. Moore, Robert W. Green and Sterling W. Goodrich as garnishees. At the January term, 1840, of the Circuit Court of Davidson county, these garnishees appeared and answered. James D. Moore's answer is in the words following:

"In the summer of 1840, I borrowed of D. M. Goodrich, at two sundry times, five hundred and odd dollars, at six months; and before the notes fell due, Mrs. Lucy B. Goodrich, wife of E. W. Goodrich, presented my notes for payment, and told me her brother D. M. Goodrich had loaned the money to me for her. I told her I had not the money to lift the notes; that she would have to get them cashed in Nashville, as she was going away. I saw her a few days after, and she told me Mr. Robert Green had my notes and requested me to pay Mr. Green the

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money. Last October I received a letter from her, requesting me to pay the money before the sale of the negroes; that was January 2d, 1843."

The answers of R. W. Green and Sterling W. Goodrich need not be noticed, as they were discharged, and the attempt by the court to connect them with the answer of Moore, so as to supply the defects in his answer, was wholly illegal. In the case of *Huff vs. Mills and others*, 7 Yerger, 42, the court says: "The liability in such cases of a garnishee depends upon his answer, which in this State is conclusive: if he answers that he executed the negotiable note or bill single, but does not know where it is or who holds it, he does not state that he is indebted to the debtor of the attaching creditor, and no judgment can be given against him." This view of the case was concurred in and reiterated in the case of *Turner & Armstrong vs. Oglesby*, 9 Yerg. 412. These authorities prove two propositions: 1st, that the answer of the garnishee is conclusive; 2d, that it must show that he is indebted to the debtor of the attaching creditor.

The first settles the question as to the power of embracing the answers of several garnishees, so as to extract what will be sufficient to charge one. The second furnishes the test for the construction of the answer of James D. Moore upon which he is liable to be charged, if chargeable at all. Does it state that he is indebted to Edmund W. Goodrich, the debtor of James and Sarah Green, the attaching creditors in this case? Surely not. Nothing from which it can be even inferred. He says he borrowed at two different times five hundred dollars from D. M. Goodrich and gave his notes at six months; and that afterwards, Lucy B. Goodrich, the wife of E. W. Goodrich, applied to him for their payment, and stated to him that D. M. Goodrich had loaned the money to him for her. Now this can scarcely be tortured into an admission of indebtedness to E. W. Goodrich. The statement of Lucy B. Goodrich would scarcely, if at all, be evidence of a right in herself, but *non constat*, (if it is,) that the money belongs to her husband; for, as has been correctly argued, she may have a separate estate of her own; and in cases of garnishment, the liability of a garnishee is not to be arrived at by surmises and inference, but from direct admis-

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sions in his answer, or conclusions necessarily following from them. If the answer be imperfect, let it be amended upon interrogatories, which the court will compel the garnishee to answer: if he answer falsely, there is an end of it: a prosecution for perjury is the punishment: and if he does not know, of course he must be discharged, for he cannot charge himself.

Judgment reversed.

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CARMAN'S *ex'r.* vs. WHITE *et als.*

A party to a note who was sued on it and afterwards obtained his discharge under the bankrupt law, is a competent witness after such discharge to prove the note usurious.

Carman's executor commenced suit in the Circuit Court of Wilson county, against Burton, Price, J. White, Ed. White, and L. White. Ed. White and J. White pleaded their discharge by virtue of a decree in bankruptcy, and a judgment was rendered in their favor. The other defendants pleaded usury, and introduced Ed. and J. White as witnesses to prove that the note sued on was usurious. The competency of the testimony was objected to, but was overruled by the presiding Judge; and the plea being sustained by their testimony, a verdict and judgment were rendered in their favor, from which the plaintiffs appealed.

*McDonald* cited 1 Phillips's Ev. 3; 2 Starkie, 581; Greenleaf's Ev. 378; *Walton vs. Shelly*, 2 Term, 296; 6 Peters, 51; 8 Peters, 12; 11 Peters, 86, 95; 12 Peters, 149; 2 Sumner, 235; 4 Mass. 156; 16 Mass. 118; 17 Mass. 122; 1 Metcalf, 416; 2 N. H. 212; 5 do. 187; 4 Greenleaf, 191; 5 Greenleaf, 374; 6 Watts, 498; 10 Martin, 18.

*Jordan Stokes*, for defendants. The main, if not the only, question presented for the decision of the court in the record, is whether Edward A. White and John W. White, who were two of the makers of the note, and who had been discharged by the

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bankrupt law prior to the trial, were competent witnesses to prove that there was usurious interest included in the note.

1. Interest is the ground on which their competency is attempted to be impeached. The general rule of evidence is thus laid down: "Will the witness either gain or lose by the direct legal operation and effect of the judgment, or will the record be legal evidence for or against him in some action." Green. on Evi. 434.

The interest must also be a direct, present, certain and vested interest, and not an interest uncertain, remote or contingent. Here the witnesses had no such interest. The certificate of discharge, by the provisions of the law operated as a full and complete extinguishment of their liability on the note, and hence they had not the remotest interest in the event of the suit.

2. In cases somewhat analagous, it has been determined that the maker of a note, who has been released by the defendant, the payee and first endorser, is an admissible witness to prove the note usurious in its inception; *Stump vs. Napier*, 2 Yerg. Rep. 35; and that one joint maker of a note, who has confessed a judgment and been released by the other maker, is a competent witness to prove an usurious consideration. *Tilford vs. Hayes*, 2 Yerg. Rep. 89. The release in these cases did not more effectually restore the competency of the witnesses, than does a decree and certificate in bankruptcy.

3. But it has been well settled, that where the liability or interest, which would have rendered the witness incompetent, has been discharged by the operation of law, as for example, by the bankrupt law or insolvent law, or by the statute of limitations, his competency is restored. Green. on Ev. 477; 6 Cow. R. 484; 2 Sergt. & R. Rep. 119; 4 Day's Rep. 121; 3 H. & L. 249; 2 Hay. Rep. 290; 9 Eng. Com. L. R. 177; 22 do. 321, 319, 290.

GREEN, J. delivered the opinion of the court.

The only question in this case, is, whether a party to a note may be a witness to prove the contract to have been usurious, after he has been discharged in bankruptcy.



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The authorities cited for the defendants in error, establish beyond doubt, that such party is a competent witness; and if there had been no authority, this court would have had no doubt as to the correctness of the judgment of the Circuit Court.

"The rules and principles of evidence are founded in a peculiar degree upon practical good sense." *Carroll vs. State*, 3 Hump. R. 321.

These witnesses could not possibly have any interest in the event of the suit, as it regarded the other parties, after they had pleaded their bankruptcy, and had a verdict in their favor.

And the technical objection to their competency, on the ground that they were parties to the action, did not apply, because after the verdict and judgment in their favor, they ceased to be parties.

Affirm the judgment.

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WOODSON vs. MOODY.

1. Where an action of assumpsit is brought upon an instrument which itself contains a promise or undertaking to pay, it is not necessary formally to set forth another promise resulting from the legal liability.
2. A guarantor is not discharged by the want of notice within a reasonable time alone. Before he is discharged, it must also appear that the guarantor suffered loss or damage by the failure to receive notice; in that event he is discharged to the extent of the loss or damage, and no further.

Woodson sold a tract of land to James G. Moody, and Moody delivered to him, in part payment of the consideration, several claims; and amongst others, a note for \$144 16, executed by John W. Oliver, on the 2d day of February, 1842, and payable to R. H. Moody, and by him endorsed and delivered to James G. Moody. This note was dischargeable in notes of any of the banks of Tennessee. J. G. Moody, at the time of the delivery of the note aforesaid, executed and delivered to Woodson an instrument of writing, in which he used the following language: "I do hereby guaranty the collection of all said notes to said Woodson, in case they cannot be collected from the makers or from said Moody."

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Woodson sued Oliver on the note and R. Moody on the endorsement, and obtained judgment against Oliver, and the endorser was discharged. Oliver was solvent at the time of the execution of the guaranty, but not when the execution issued. The money was not made.

Having failed to collect the money from Moody or Oliver, Woodson instituted this action on the case in the Circuit Court of Montgomery county, against James G. Moody, and his declaration set out the guaranty and a breach thereof, and the case was submitted to a jury, Judge Martin presiding, at the July term, 1843. The judgment, *fi. fa.* return, were introduced and much proof in regard to the solvency of the maker of the note, which it is not necessary here to exhibit. It did not appear, that notice had been given to the guarantor of the failure to collect the money.

The jury, under the charge of the presiding Judge, rendered a verdict in favor of the plaintiff. The defendant moved the court to set aside this verdict. The motion was overruled. A motion was then made in arrest of judgment. This motion prevailed, and the plaintiff appealed.

*Johnson*, for the plaintiff.

*Garland*, for the defendant. The questions presented by this record are,

1st. Did the Circuit Judge err in arresting the judgment?

The declaration sets out the guaranty upon which the action is brought, and charges the breach without averring *any promise*. It is a declaration in assumpsit. It is stated in 1 Chitty's Plead. 265, that a declaration in assumpsit on a bill of exchange need not expressly aver a promise, because the promise is presumed in such a case: and the doctrine to be gathered from Mr. Chitty is, that when the undertaking depends upon a contingency, so that the promise to pay does not directly and legally flow from the written contract declared upon, a promise must be averred in the declaration. And although this doctrine would amply sustain the judgment of the court below, yet the American authorities go farther, and leave no doubt that the judgment

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should have been arrested, as will be seen by reference to 2 Call. 39; 1 Call. 83; 3 Munford, 566; 6 Munford, 506; 10 Wendell, 488; Gould on Pleading, 942, 44.

This is not a case in which a good title is defectively set out, and so cured by verdict. 3 Mars. 169; 1 New Hamp. 246.

2d. Was notice to the defendant of the failure of plaintiff to collect the note of Oliver Moody necessary?

What is the reasonable meaning of this guaranty? It cannot be doubted, that the defendant meant "to bind himself to pay the money called for in the note, provided the plaintiff could not, by due diligence, enforce the collection of the note from either the maker or endorser." Can it be doubted, that this, by its express terms, is a conditional undertaking on the part of the defendant, he agreeing to pay after a failure by plaintiff to collect from the parties to the note? Here was something to be done before his liability began, and that not to be done by *himself*, or yet by a *stranger*, but by the plaintiff in this action. This was to take legal steps to enforce the payment of the note; all control of the note, and consequently all legal knowledge of the facts connected with its collection, having been parted with by the defendant. If this act had to be performed by the defendant, he was bound to know its result; if by a stranger, he had as good right and as perfect means to know it as the plaintiff; and in either case, defendant would not be entitled to notice: but in the case at bar, the defendant's liability did not commence until certain acts had been performed by the plaintiffs, which acts were beyond his control and knowledge; and according to every principle of common justice, he was entitled to prove when his liability did commence, either by notice in the usual way, or in the nature of a special request.

The ground upon which an endorser is entitled to notice is, that his undertaking is a conditional one. He does not expressly contract for notice, but the law makes that a part of his contract; and I hold it to be incontrovertibly true, that when this contract is established to be a conditional one, notice becomes a necessary part of it.

The cases in 3 Yerger, 330, 487, 4 Yer. and 3 Hum. all decide, that the guarantors of a bill or note in the cases then before

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the court were not entitled to notice, expressly upon the ground that the undertakings were positive and unconditional. All these cases are founded upon a case in 20 Johns. Rep. 366, which is also decided upon the ground that the undertaking was absolute: none of them conflict with the doctrine here contended for, but by implication recognize it. I know no case in which the question has been raised upon a guaranty corresponding so exactly in terms and in meaning with the one now under discussion, as the case of *Grice vs. Ricks*, 3 Devereaux's Rep. 62, where it is decided that "notice in a reasonable time and before suit, is indispensably necessary.

The doctrine of notice to guarantors is recognized in many cases not distinguishable in principle from the present. 7 Peters's Rep, 113; Chitty on Bills, 8th Am. from 8th Lond. ed. 321-4; 7 Cranch, 69.

The proposition is universally admitted, that if the maker of a note is good when the note falls due and afterwards becomes insolvent, a presumption of damage to the guarantor will arise, and must be rebutted by proof. Mr. Justice Story discusses this doctrine with great ability in his work on Bills, 305-373 and note. In the case at bar it is amply proved that Oliver was perfectly good when the note fell due, eight days after the guaranty was made.

RAND, J. delivered the opinion of the court.

This is an action of assumpsit brought by the plaintiff against the defendant upon a guaranty. In the declaration it is set forth, that in consideration the said James G. Woodson had sold a tract of land therein mentioned to the defendant, he made and executed his instrument of writing, &c. in which he "guaranteed" the "collection" of a note executed by John W. Oliver for \$154 10, due 1842, which was transferred to the plaintiff by R. W. Moody, in case it should not be collected from the maker John W. Oliver, or the said R. W. Moody; and the declaration averred that the "amount due upon said note could not be collected from the maker or the endorser, and that the amount had never been paid by the maker or endorser; never-

[Woodson vs. Moody.]

theless, the defendant, not regarding his said promise, and undertaking, &c. has not paid, &c. although often requested," &c.

The defendant pleaded the general issue, upon which a trial was had, and the jury found a verdict for the plaintiff. The defendant moved in arrest of judgment, and the Circuit Court arrested the judgment.

This action of the Circuit Court was based upon the ground, as we understand, that the declaration, after stating the non-collection of the note from the maker and endorser, and the non-payment by them, should have alleged a promise, on the part of the defendant, to pay, and that the omission of such an allegation is fatal even after verdict. Of the instrument of guaranty we can know nothing in this aspect of the question, except as it is set forth in the declaration. The defendant, according to that, *guarantees* the *collection* of the note in case it is not collected from the maker or endorser; that is, he promises and binds himself to pay the amount of the note if it cannot be collected from the maker and endorser; and the plaintiff avers it could not be collected, was not paid, and that the defendant had broken the promise contained in the guaranty.

Do these circumstances and facts constitute only a defective title; or do they constitute a title which at the worst can be said to be only defectively stated? if the latter were the case, then the plea and the verdict would cure such defective statement. But we do not suppose that the statement of title to recover is even defectively set forth. For, where an action of *assumpsit* is brought upon an instrument which itself contains a promise or undertaking to pay, or some expression equivalent to a promise to pay, it is not necessary formally to set forth another promise resulting from legal liability. See Chitty, 7th Am. ed. 362, 490, n. q. s; 4 T. R. 149; Salk. 128; Stra. 214.

We see no just ground, therefore, for arresting the judgment.

2. The next question arises upon a bill of exceptions taken in the case, and is, whether a new trial should be granted to the defendant for any thing erroneous in the charge of the court. The court charged the jury, that to entitle the plaintiff to recover, he must show, that after the use of reasonable diligence on his part the amount of the note on J. W. Oliver could not be collected.

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The plaintiff was not bound to use the greatest possible diligence, but such as a prudent and vigilant man would bestow on his affairs. That the note not being negotiable, the endorser was not liable at all; and that, as to notice, the defendant was not entitled thereto, unless it appeared that he was prejudiced for the want of it. But if the maker of the note guaranteed was solvent when the note fell due, the law would infer that the defendant was prejudiced; that such inference must be rebutted by proof showing that the defendant suffered no injury by not being notified; in which event, no notice was necessary. That the point of time at which defendant was entitled to notice, if Oliver was solvent when the note fell due, was within a reasonable time after the failure of the endorser to collect the note from Oliver and Moody was known, and not at the time the note fell due." In this charge, we think there is no error, of which the defendant can complain. In the case of *Wilds vs. Savage*, 1 William W. Story's Rep. Justice Story, in one of those elaborate judgments which reviews all the cases and exhausts the subject, sums up the matter involved in the above charge thus: "I take the doctrine to be well settled, that upon a guaranty to discharge the guarantor, there must not only be a want of notice within a reasonable time, but there must also be some loss or damage sustained by the guarantor, and that if there be a loss or damage, that the guaranty is not totally discharged, but only *pro tanto* to the amount of the loss or damage. The case is constantly distinguished in the authorities from that of an endorser to negotiable paper. The latter is entitled to strict notice. The guarantor is entitled only to notice where he is or may be prejudiced by the want of it. If the debtor is solvent when the money becomes due, and no notice is given to the guarantor, and the debtor afterwards, and before notice, becomes insolvent, the guaranty is discharged." The last expression in the above extract has relation to a case where the payment of the note, when it becomes due, is guaranteed; and does not apply to a case like that before us, where the guarantor does not become liable to pay at the time the note falls due in default of payment by the maker, but only becomes liable after a failure to collect by suit; then, if the maker be solvent

[Doyle et als. vs. Glenn.]

when the note falls due, the guarantor is entitled to notice within a reasonable time after the failure to collect by the use of due diligence has been ascertained: and that was the charge of the Circuit Court. In this part of it, therefore, or in any other, we see no just ground for reversal.

The judgment of the Circuit Court, therefore, in arrest, will be overruled; a new trial will be refused, and judgment be given upon the verdict.

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DOYLE *et als.* vs. GLENN.

1. The issuance of an alias *f. fa.*, collection of a portion of the money thereupon, and receipt of it by the plaintiff, is no waiver of a previous default of a sheriff on the non-return of the original *f. fa.*
2. An officer in default who has paid off the *f. fa.* has no equity against the defendant in the *f. fa.* The payment of the *f. fa.* is the penalty the law inflicts upon him for his neglect of duty.

This bill was filed in the Chancery Court at McMinnville, and was tried by Chancellor Williams, at the July term, 1843, on bill, answer, replication and proof. He dismissed the bill, and complainant appealed.

*Turney*, for complainants.

*Campbell*, for defendant.

GREEN, J. delivered the opinion of the court.

The complainant, as coroner of White county, received into his hands an execution against J. T. Bradley, sheriff of said county, and his sureties, in favor of the defendant Glenn. Doyle, the coroner, failed to return the execution according to law; an alias execution was sued out and put in the hands of Little, the successor of Doyle as coroner, who made part of the money and paid it over to Glenn.

A judgment was then taken, by motion, against Doyle and his

[Doyle et al. vs. Glenn.]

sureties, by Glenn, for the balance due on his execution together with damages and costs. This bill is filed to enjoin said judgment, and alleges that the execution was held up by the direction of the attorney of Glenn, in pursuance of an arrangement between himself and Bradley.

The bill also alleges, that Little, the coroner, in whose hands the alias execution was placed, levied on the property of Bradley and his sureties, sufficient to satisfy the same, and insists that said levy ought to be regarded as a satisfaction of defendant's execution, and ought to release complainant Doyle and his sureties from liability.

The answer of Doyle denies that his attorney authorized the complainant to hold up the execution; and denies that the money could have been made by virtue of the alias execution; that the defendants in that execution enjoined the sale of the property levied on, &c.

There is no proof that Glenn's attorney authorized the coroner to hold up the execution as charged in the bill. It appears from an endorsement of Little, the coroner, in whose hands the alias *fi. fa.* was placed, that he levied upon a wagon and six horses, as the property of England, one of the defendants, worth 550 dollars. It does not appear what disposition was made of said property, but it is shown that England paid \$170. This sum was credited when the judgment in this case was taken. We are of opinion that the complainant is entitled to no relief in this court. If the issuance of an alias *fi. fa.* after he had been guilty of the default in the non-return of Glenn's first execution would operate as a waiver of the right of Glenn to have a judgment against Doyle for such default, the complainant should have availed himself of that defence on the trial at law; and not having done so, he cannot set it up here.

But it has been decided by this court, in several cases, that the issuance of another execution is not a waiver of the right of motion against a defaulting officer; and more especially is this the case where such execution is issued at the instance and for the benefit of such defaulter.

But the complainants' counsel insist, that Doyle has a right to be substituted to all the right of Glenn, against Bradley and



[*Bank of Alabama vs. Fitzpatrick.*]

his sureties. This cannot be. He has no *equity*, by reason of the judgment against him for failing to do his duty as an officer. The law makes him liable for the amount of the execution as a penalty for his default; and certainly he can base no equity upon a wrong for which the law inflicts a penalty upon him. Upon the whole, we think the complainant has shown no ground of defence against this judgment; and if the matters set up in his bill could have availed to resist Glenn's claim, they were all proper defences in the trial at law, and cannot now be insisted on.

Affirm the judgment.

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**BANK OF ALABAMA vs. FITZPATRICK.**

1. The execution of a bond as required by statute is a necessary prerequisite to the issuance of an attachment bill; and where the bond is not such as is required by the statute, it is the same thing as though there was no bond; and in either case, a motion to dismiss is the proper remedy.
2. The question of the right of complainant to amend an attachment bond, cannot be made in the Supreme Court, unless a motion to amend was made in the Chancery Court.

*Nicholson and Houston*, for Bank of Alabama.

*Wright and Ewing*, for Fitzpatrick.

GREEN, J. delivered the opinion of the court.

This is an attachment bill filed in the Chancery Court at Columbia. The bond executed by the complainant contains no clause of indemnity for wrongfully suing out the attachment. The defendant executed a replevin bond, regained possession of his property, and moved to dismiss the bill; and the bill was dismissed by the Chancellor, and the complainant appealed to this court.

It is now insisted, that the Chancellor erred in dismissing the bill, because advantage could only be taken of the defect in the bond by plea in abatement.

[York vs. Bright.]

We think the motion to dismiss was regular. The execution of a bond, as required by the statute, was a necessary prerequisite to the issuance of the attachment. 1 Dev. 400. It is admitted, that the bond in this case is not such as the statute requires. It is, then, the same thing as though there was no bond. In such a case, a motion to dismiss is the proper remedy. 4 Yer. Rep. 81; 6 Yer. Rep. 474.

But it is insisted, that this defect of the bond was not of such character as to make the whole proceedings void, but that they were voidable only, and therefore subject to amendment.

It is not necessary to discuss this question, inasmuch as there was no motion to amend made in the court below; and certainly the court did not err, in failing to make an order that the party did not ask for; and as we act upon the record and can reverse for error apparent upon that only, there is no ground for this argument, however we might think the question should be decided, if properly made.

Let the decree be affirmed.

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YORK vs. BRIGHT.

The statute of limitations runs in favor of possession of land, and a title therefor, obtained by fraud.

In 1820, two hundred and twelve acres of land, lying in Van Buren county, was sold by Martin Johnson to Uriah York, which included the land in controversy. He gave York a bond for title. Bright, the defendant in this case, then had possession of the land as tenant of Johnson, and continued his possession under York. In 1823, York sold a part of the 212 acres, by verbal sale, to Bright, and in the same year Bright got a deed from Johnson for a tract of  $2\frac{1}{2}$  acres of land, a part of the 212 acres. The six square poles in controversy is a part of the land conveyed by Johnson to Bright. The bill charges, that when U. York sold the  $2\frac{1}{2}$  acres he reserved the six square poles, on which was a spring, and that Bright by a fraudulent

*[York vs. Bright.]*

misrepresentation of the contract with U. York, obtained from Johnson a deed for the whole  $2\frac{1}{4}$  acres. Bright remained in possession some twenty years. His deed had not been registered during this time. U. York sold the land to his son G. W. York, the present complainant, who obtained possession of the land. Bright instituted an action of ejectment against G. W. York in the Circuit Court of Van Buren county, to enjoin which, and set up his equitable title, the complainant, G. W. York, filed this bill. Bright in his answer denied that he obtained the deed from Johnson by fraud; alleged he had purchased the whole  $2\frac{1}{4}$  acres, and relied upon the statute of limitations. U. York proved he sold him part only of the  $2\frac{1}{4}$  acres, and reserved the six square poles in controversy. It was heard before Chancellor Ridley, on bill, answer, replication and proof. The Chancellor dismissed the bill, and complainant appealed.

*Campbell*, for complainant.

*Taul*, for defendant.

GREEN, J. delivered the opinion of the court.

This bill charges, that the complainant is the equitable owner of the six square poles of land in controversy, and that the defendant fraudulently procured a deed to be made to himself by Martin Johnson, in whom the legal title was vested, and prays a divestiture, &c. The defendant pleads the statute of limitations.

The proof shows, that the defendant has been in possession of the land twenty years, claiming it, as his own, by virtue of an unregistered deed from Johnson.

The statute of limitations is clearly a bar to this suit. The fact, that the defendant procured a deed by fraud, if it were so, and fraudulently obtained possession, would make no difference. The statute makes no exception for fraud, and will run in favor of a possession and title obtained by fraud. Affirm the decree.

*JONES, governor, vs. SIMMONS.*

The plaintiff declared upon a Constable's bond, and made profert of the original. On Oyer craved, he produced a copy, and the defendant demurred for a variance: Held, that the demurrer was sustainable. The fact, that during the argument of the demurrer the original was brought into court, would make no difference.

This action of covenant was instituted in the Circuit Court of Wayne county, and judgment was rendered (Totten, Judge, presiding,) on demurrer in favor of the defendant, from which the plaintiff appealed.

*Rose*, for the plaintiff.

*Goods and Jones*, for the defendant.

**RESEN, J.** delivered the opinion of the court.

This is an action of covenant upon a Constable's bond. The defendant craved Oyer of the bond and condition and set them out; from which it appears, that the suit was brought upon a copy of the official bond, although the declaration and profert describe it as the original bond. For this reason the defendant demurred, and the court sustained the demurrer.

This was proper. A bill of exceptions shows, that during the argument of the demurrer, the original bond was brought into court. That circumstance would make no difference.

There was no motion made by the plaintiff to amend the pleadings.

The judgment of the Circuit Court must be affirmed.

NOLENSVILLE T. Co. vs. BAKER *et als.*

The legislature have the power to authorize companies, chartered to construct Turnpikes, to construct them on existing public roads, and the constructing of such Turnpikes abolishes the old roads on which they are located, or which run parallel with and adjoining them.

In 1836, the legislature chartered the Nashville and Nolensville Turnpike Company to construct a Turnpike Road from Nashville to Nolensville, in Davidson county. This road was constructed; and from the town of Nashville, two miles, it occupied the bed of an old road, called the Nolensville road, except in a few places where the Nolensville road was crooked. At the distance of two miles from town, the Company bought two acres of ground, and erected a toll gate thereupon, as they were authorised to do by the terms of the charter. Near about this point another road, called the Mill creek road, came into the Nolensville road. Some of the witnesses swore this road came into the Turnpike between the gate and the town of Nashville, and others, that it joined the road before the gate was reached in coming towards the town, and so was the weight of the testimony. The Turnpike road was constructed sixty feet wide by the terms of the charter, and the Nolensville road was about 80 or 90 feet wide in the vicinity of the gate. The gate house was erected on a part of the bed of the old road, and the Turnpike on the balance of it.

The Company had applied to the County Court of Davidson county in 1841, and got an order to have the road discontinued; so that those traveling the Mill creek road were now compelled to pass through the gate. To avoid this, Baker, Nance and other citizens of Davidson county petitioned the County Court to annul the order, rescinding the Nolensville road. The County Court appointed a jury of view, who reported in favor of the prayer of the petition. The Company appeared by their Attorney and resisted the application. The County Court, however, rescinded the order, and directed the road to be re-opened. The Company appealed to the Circuit Court.

The case was tried before Judge Maney, at the January term, 1843. He was of the opinion, that the order establish-

[*Nolensville T. Co. vs. Baker et al.*]

ing the Nolensville road was void; that the Turnpike road, so far as it occupied the bed of the old road, extinguished the right of the public to travel thereupon, or upon the old road, but that there was a space of some twenty or thirty feet of the old road which was not occupied by the Turnpike, which as a public easement was not extinguished by actual occupation, and that the petitioners had a right to travel along so much of said road without molestation, and decreed accordingly.

*E. Ewing and J. Campbell*, for plaintiffs in error. See 2 Caines Rep. 177; 1 John. Ch. 611; 5 John. Ch. 101; 4 John. Ch. 150.

*Meigs*, for defendants in error. See Woolwych on Ways, 65 to 68.

GREEN, J. delivered the opinion of the court.

The Charter of the Nolensville Turnpike Company refers to the Franklin Turnpike Company, and grants the same rights and privileges, as are therein granted to the Franklin Turnpike Company.

The Company was authorized after the completion of five miles of the road, to erect a toll-gate and receive tolls; but no toll-gate was to be erected in a less distance than two miles from the town of Nashville. It also provided, (acts 1839, Pamphlet, page 166,) that "all roads except on the ground where the Turnpike may pass, now in use, shall be continued as heretofore, unless the County Courts in the county through which they may pass, shall order them or either of them to be discontinued."

The charter directed also, that the road should be opened at least 30 feet wide, with sufficient ditches on each side. The road has been constructed and a gate is erected two miles from Nashville. This road, for the distance of these two miles, is upon the bed of an old road, called the Nolensville Road, except a few segments of the old road, which are departed from by the new road, for the reason, that it does not conform to the

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old road. There is a neighborhood road called "the Mill creek road," which intersects the Turnpike road near the gate. The Turnpike Company insist that this road is merged in the turnpike south of their gate, and that the gate must be passed through in travelling the Mill creek road to Nashville. The defendants in error, insist that the margins of the two roads only adjoin south of the gate, and that they have a right to travel on that part of the old road, which is not occupied by the turnpike, parallel with the turnpike, so as to avoid going through the gate.

From the evidence it appears that there is a small stream, a few feet south of the gate, near which the old road was very wide; made so by travellers turning from the centre, to seek better ground, thereby having for the breadth of 90 feet, the appearance of travel, and giving to the ground the character of a road. The turnpike has been placed upon the old road; but on the east side, it does not occupy at the gate, all the ground constituting the old road. Some 20 or 30 feet of the old road remain, east of the ditch of the turnpike.

We think the Turnpike Company, by running upon the bed of the old road, destroyed and abolished that road, as a public easement. The charter declares, that "all roads except on the ground where the turnpike may pass, now in use, shall be continued as heretofore." But the Turnpike Company in establishing their road, on "the nearest and most practicable route," had a right to occupy the ground on which an old road had been laid out. Of course the old road would cease to exist. For although the margin of the old road might still be visible, along the track of the turnpike for the whole distance, for the reason that it may have been twice as wide as the turnpike, yet its existence as a public road would be destroyed; because to continue the old road, parallel with, and adjoining the margin of the turnpike, would be inconsistent with the franchise granted to the Turnpike Company. They have built the road in fulfilment of a contract with the State, by which in consideration of their labor and expense in the construction thereof, for the benefit of the public, they are authorized to erect gates and receive toll. If the margin of an old road might be traveled, so

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as to avoid the turnpike toll-gates, this right would be utterly defeated. Where two conflicting rights exist, the less must give way to the greater. The traveling public have no vested right in the easement of a public road. They may be granted or abolished by the State at pleasure; and when a turnpike road is constructed along the bed of such road, in pursuance of a charter, that vests in the Company the right to receive toll, the old road is thereby abolished. The vested right which the Company has in the franchise, is superior to any right of easement that the public had in the old road.

It is insisted, however, that the "Mill Creek Road" is not merged in the turnpike south of the gate, and that as part of the road is visible, that part may be traveled without going through the gate. We are of opinion that the roads came together before the gate is reached. Many of the witnesses say, that the turnpike was built on the centre of the old road. Mr. Bostick who superintended the laying out and construction of the road, says, that at the gate, the turnpike is in the centre of the old road. Other witnesses think the roads do not come together until after the gate is passed. All agree that a part of the old road is visible east of the turnpike; but many witnesses speak of the great width of the old road; so that if the turnpike were on the centre of the old road, part of it would still be visible.

We are of opinion, that the turnpike at the gate, is, in the language of the charter, on the ground occupied by the old road, and consequently its existence as a public road, is not preserved by that provision of the charter, but that it is abolished by the construction of the turnpike.

The judgment reversed, and the application refused.



## UZZELL vs. MACK.

Houser conveyed a town lot to Plummer, reserving in the deed a lien for the purchase money, and took also Plummer's note with Uzzell as surety. Plummer sold the lot to Mack, and died insolvent. Uzzell paid the notes on which he was surety: Held, that he was entitled to the benefit of Houser's lien on the lot for his indemnity.

This case was heard at the September term, 1843, of the Chancery Court at Columbia, Chancellor, Bramlitt, presiding, on bill, answer, replication and proof. He was of the opinion, that complainant had no equity, and dismissed the bill. Complainant appealed. The facts are all stated in the opinion of the court.

*Nicholson*, for complainant, cited 6 Paige, 521; *McNairy vs. Eastland*, 10 Yerg. 310; 3 Hump. 547; 1 John. Ch. Rep. 413, 420; Story's Eq. 638; 4 John. Ch. Rep. 129, 545; 3 Paige, 614; 11 Ves. 12; 6 Ves. 805; 7 Story Eq. sec. 499.

*S. D. Frierson*, for defendant, cited 11 Eng. Ch. Rep. 128; 8 Eng. Ch. Rep. 388; 2 Hill Ch. Rep. 262; Meigs' Rep. 56; 2 P. Williams, 291; 2 Atk. 272; 5 Yerg. 205; 3 Dev. 380; 3 Litt. 404.

GREEN, J. delivered the opinion of the court.

The complainant in this bill, seeks to be substituted to the rights of a creditor, whose debt he has paid as a surety, to enforce the creditor's lien for the purchase money of the estate. The facts are shortly these:

James R. Plummer purchased of Henry D. Houser, two lots in Columbia for \$1995, to be paid in three annual instalments, of \$665 each. To secure these payments, he executed his three several notes, with P. Nelson and Elisha Uzzell as his sureties. A deed was made to Plummer by Houser, on the face of which it is stipulated, that Houser retains a lien upon the lots for the purchase money.

Sometime afterwards, Robert Mack purchased the lots from Plummer, at the price of \$2800, and in part payment thereof, he took up the two last notes Plummer had given to Houser,

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and paid in cash \$300 on the first note, which left upwards of \$300 of the purchase money unpaid to Houser.

Subsequently Plummer has become insolvent, and Uzzell has paid to Houser the balance due him for the lots, and for the payment of which, he was bound as Plummer's surety.

When Mack purchased the lots, he knew that a lien was retained by Houser, in the deed to Plummer, and he also knew that the purchase money had not all been fully paid.

There is no question, but that, as a general principle, sureties, who pay a debt, are entitled to stand in the place of a creditor, as to all securities or liens, which he may have against other persons or property on account of the debt.

The only question here is, whether there was any thing remaining after Houser's debt was paid, to which the surety, paying it, could be substituted. Where a surety pays a bond, or discharges a judgment, he extinguishes the only security the creditor has, and that being extinguished, there is nothing to which he can be substituted. But if the creditor has a security against another person, for the same debt, or upon other property, these being distinct from the obligation he held on the surety, the discharge of that obligation by the surety, does not extinguish such other security or lien; as against such security or lien the debt still remains. The surety who paid the creditor, entitled to stand in his place, and to be substituted to all his rights.

In the case before the court, Houser had two securities for his money; the bond of Plummer, Nelson and Uzzell, and the lien reserved in the deed.

When Uzzell, as Plummer's surety, paid the bond, that was extinguished, but the lien on the land, is a distinct thing, constituting a different security, which the payment of the bond by Uzzell does not affect. Uzzell stands in the shoes of Houser, and the purchase money being unpaid, the lien on the land continues by the very terms of the deed.

We think this a clear case for substitution, and reverse the decree, and order that a decree be entered for the complainant.

## KINCANNON vs. KIDD.

Kincannon & Co. issued change tickets in these words, "On demand, we promise to pay the sum of one dollar in Tennessee or Alabama bank notes, when the sum of five dollars is presented:" Held, that no suit lay against the makers, without presentation and demand of five or more tickets.

*Campbell*, for the plaintiff.

The records do not show who appeared for the defendant.

REESB, J. delivered the opinion of the court.

This was an action brought before a Justice of the Peace by the defendant in error against the plaintiff in error, upon twenty eight change tickets, of one dollar each; all of them are in the same form. The following is a copy of one of them, to wit:

"(Authorized by the State.) No. 2366.

"On demand, we promise to pay M. Hill, or bearer, one dollar in Tennessee and Alabama bank notes, when the sum of five dollars is presented. McMinnville, Ten., June the 8th, 1838.

L. A. KINCANNON & Co."

The defendant in error, obtained before the Justice, a judgment for twenty-eight dollars against the plaintiff in error, from which the latter appealed to the Circuit Court, where the cause was tried before a jury, who rendered the following special verdict:

They find, that the time of the issuance of the warrant in this case, to wit, on the 7th day of April, 1842, the plaintiff was, and ever since has been the holder of the change tickets, issued by the defendant, amounting to twenty-eight dollars; that these tickets had been issued and circulated as currency. By the terms expressed on the face of the tickets, they are payable on demand, to M. Hill or bearer, in Tennessee or Alabama bank notes, when the sum of five dollars should be presented. We find, that on the day of the commencement of the suit, Alabama bank notes were at a discount of twenty per cent; that the tickets sued on, on that day, were worth in money twenty-two dollars and forty cents. We further find, that the plaintiff did not present these notes to the defendant previous

[Kincannon vs. Kidd.]

to the commencement of this suit. If no special request was necessary to be made for the payment, by the plaintiff, before the bringing of the suit, then we find the matters in controversy in favor of the plaintiff; and that the defendant owes him twenty two dollars and forty cents. If a special request be necessary, then, we find the matter in controversy in favor of the defendant." The Circuit Court gave judgment upon this verdict in favor of the plaintiff below, and the defendant has prosecuted his appeal, in error, to this court.

We are of opinion, that the judgment of the Circuit Court is erroneous. It is true, that where a sum of money, by the terms of a written promise, is simply due upon demand, the bringing of the suit, is held to be a sufficient demand.

But this is not the case here. The makers of these change tickets promised to pay each ticket of one dollar in Tennessee and Alabama bank notes, when five dollars of such tickets should at one time be presented to them. In view of such express stipulations, could the holder of one ticket bring his suit thereon, without demand? We think not. For he would not be entitled, upon presentation and special request, to payment of such single ticket, by the very term of the stipulation on the face of such ticket. If the holder had in his possession five of such tickets, which would authorize him to receive on their presentation, payment in Tennessee or Alabama bank notes, would the fact of such possession, to that or a greater amount, of these tickets, authorize him, at once, and without their presentation for payment, to bring his suit? We think not. To do so, would contradict the terms of the instrument, by which presentation is made necessary to create a breach of the promise to pay, and it would also contradict the object and purpose for which that sort of currency was authorized by law, and was put into circulation; subjecting the makers of such instruments to expensive and multiplied litigations, whatever might be the adequacy of their means, or the punctuality of their dispositions to redeem the paper circulation set afloat by them.

The judgment will, therefore, be reversed, and judgment be given in favor of the plaintiff in error.

**GARRATT vs. ELIFF.**

1. The act of 1817, ch. 119, sec. 1, giving a summary remedy against sureties in injunction bonds, cannot be extended beyond the express letter of the statute, to wit, to cases where the injunction is dissolved by motion in the progress of the case, and where it is dissolved on final hearing.
2. The statute does not authorize a judgment in the summary manner, prescribed in the statute, where the complainant dies, and the injunction is dissolved by the abatement of the bill.

This case was abated by the death of complainant, and a decree was entered up against E. Eliff and J. Eliff, the sureties in the injunction bond, Bramlitt, Chancellor, presiding. A transcript of the record was filed in the office of the Clerk of the Supreme Court, and writ of error moved for.

*Wright*, for complainants.

*N. S. Brown*, for defendants.

**GREEN, J.** delivered the opinion of the court.

John Eliff filed his bill in the Chancery Court at Pulaski, against George W. Garratt and Benjamin Garratt, in which he prayed for an injunction against a judgment which they had obtained at law against him. The injunction was awarded, and Clement H. Eliff and Joseph Eliff became his sureties in the injunction bond. John Eliff, the complainant, died, and no steps having been taken to revive the suit, the court at September term, 1842, entered up a decree of abatement as to John Eliff, and ordered that the injunction be dissolved, and that the defendants recover the amount of their judgment at law, from the sureties in the injunction bond. To reverse this judgment, these sureties prosecute this writ of error.

The act of 1819, ch. 119, sec. 1, Car. & Nich. 386, provides, "that where any injunction shall be obtained to stay the collection of any money on a judgment in any of the courts of this State, and the same shall be dissolved on motion, or on the final hearing of the cause, it shall be the duty of the Clerk of the court, in which the said injunction shall be dissolved or final

[*Garratt vs. Elliff*.]

decree rendered, to enter up judgment against the party obtaining the same and securities for the amount of the principal, interest and costs, and execution shall issue as in other cases."

The remedy provided in this act of Assembly, is of the most summary character, without notice to the parties to be affected, and consequently cannot be extended, by construction, beyond the cases specified in the statute. What are those cases? The act says, "that the Clerk shall enter up judgment when an injunction shall be dissolved on motion or on final hearing." The dissolution on motion, here intended, is when in the progress of the cause, before it has been brought to a hearing, the party who has been enjoined, may move that the injunction be dissolved. And evidently the hearing referred to in the statute, relates to the final adjudication of the cause, as it may be brought to a hearing according to the course of the court.

In the case before us, neither of these events occurred. The complainant died, and no steps having been taken to revive the suit, it abated. There was no dissolution of the injunction by motion within the meaning of the statute, and manifestly no hearing of the cause. The court, therefore, had no authority, in this summary manner, to enter up judgment against the sureties of the complainant.

This question came before this court in the case of *Patterson vs. Stewart*, 6 Yerg. Rep. 26, in which case the court held, that the judgment against the sureties was erroneous. We have reviewed the grounds of that decision and approve it.

Let the judgment be reversed.

## PARIS vs. BURGER.

1. The purchaser of land at execution sale, becomes by his purchase and the deed of the Sheriff vested with the title, and a tender or payment of the purchase money, with ten per cent thereupon, does not revert the title in the execution debtor, so as to enable him to maintain an action of ejectment against the purchaser.
2. The execution debtor, whose land is sold, is entitled to a reconveyance of the land when he tenders the redemption money, as required by statute; and if it be not made, the right may be enforced in equity.

Burger recovered judgment against Paris; executions were issued and levied on four hundred acres of land belonging to Paris, lying in the county of DeKalb. The land was sold, and Burger became the purchaser, received a deed from the Sheriff, and instituted an action of ejectment against Paris, in the Circuit Court of DeKalb county, to recover possession. The case was submitted to a jury at the April term, 1843, Judge Caruthers presiding.

The plaintiff having produced his evidences of title, the defendant offered to prove, that within the two years, limited by law for redemption, he had paid to the plaintiff the redemption money as required by the statute. This was rejected, and a verdict rendered in favor of the plaintiff. The defendant's motion for a new trial having been made and overruled, and judgment rendered, he appealed.

*S. Turney*, for the plaintiff in error.

*Brian*, for the defendant in error.

GREEN, J. delivered the opinion of the court.

The tract of land in controversy was levied on as the property of Paris, by virtue of several executions against him, and was sold to the defendant in error, Burger; who received a deed from the Sheriff, and now prosecutes this action of ejectment to obtain possession.

The defendant attempted to prove, that he had paid Burger the monies he was entitled to receive in redemption of the land, but the court said, "the parol transaction between the parties

[Paris vs. Burger.]

concerning the redemption could not be considered in this action. The judgment, execution, levy and sale, and the Sheriff's deed to Burger, conveyed the legal title to him, notwithstanding any parol redemption." A judgment was rendered for the plaintiff, and the defendant appealed to this court.

It is insisted by the counsel for the plaintiff in error, that the sale of land by virtue of an execution, and a conveyance by the Sheriff, vests in the purchaser an estate upon condition only, which condition being complied with, as prescribed in the act of 1819, ch. 11, the condition is saved, and the person redeeming, becomes the legal owner to every intent.

We think the title obtained by a purchaser at execution sale of land, under the redemption law of 1820, is very different from that which exists, where there is a mortgage or pledge. The mortgage is a mere security for the debt, and the mortgagor is looked upon as the real owner, until the condition be broken. If the security be lost, the debt remains.

But the act of 1820, does not convert the purchaser at execution sale into a mortgagee; he becomes absolute owner of the property; and should it be lost, he loses the money he paid the Sheriff on his purchase.

If a tender or payment of the purchase money be made, it is the duty of the purchaser to reconvey to the debtor. But the legislature did not contemplate that this act *in pais* should re-vest the debtor with the legal title.

In the case of *Hawkins vs. Jamison*, (Mar. & Yerg. Rep. 83,) this question is elaborately discussed by Judge Crabb; and the court decide, that the tender or payment of the purchase money and interest, according to the provisions of the act of 1820, did not re-vest the debtor with the title to a negro, so as to enable the party to maintain trover for the recovery of such property. The court say, "the purchaser is the legal owner of the property, subject to the right of the debtor, &c., to repurchase it." This is an equitable right, and can only be enforced in a Court of Equity, if the purchaser refuse to reconvey.

Affirm the judgment.



## UNION BANK vs. HICKS, EWING &amp; Co.

1. A judgment by default, admits the cause of action alleged in the declaration, and no proof can be heard to disprove its existence.
2. Where an action was brought by the endorsee of a note, which was deposited in Bank for collection, against the Bank for neglect in making demand, and giving notice to the endorser, whereby he was discharged and the debt lost, a judgment by default admitted the execution of the note, the endorsement, the deposit of the note in Bank for collection, and the neglect to give notice. These were all necessary ingredients and indispensable parts of the cause of action, as stated in the declaration.

This action on the case was instituted in the Circuit Court of Davidson county, by Hicks, Ewing & Co. against the President, Directors & Co. of the Union Bank, at the May term, 1843, and a verdict and judgment were rendered in favor of the plaintiffs, Maney, Judge, presiding, for the sum of \$2877. The Bank appealed.

*Washington*, for plaintiffs in error.

*A. Ewing*, for defendants in error.

GREEN, J. delivered the opinion of the court.

Two notes were placed in the Union Bank by Hicks, Ewing & Co., for collection, the one as alleged in the declaration, executed by A. Dale & Co., and endorsed by Lemuel Duncan and R. F. Knott & Co., and the other executed by A. Dale & Co., and endorsed by Dale & Philips and R. F. Knott & Co. These notes were endorsed by Hicks, Ewing & Co. and placed in the Branch of the Union Bank at Columbia, to be collected according to the custom of the Bank. But no demand was made at the Union Bank at Nashville, where the notes were payable, when they fell due, nor was notice given to the endorsers. The Bank suffered judgment to go by default, and when a jury was empannelled to enquire of the damages, evidence was offered to prove the endorsement of R. F. Knott & Co. a forgery.

The court was of opinion, that this evidence, was incompetent, and that the judgment by default was an admission of the endorsement as described in the declaration.

[Union Bank vs. Hicks, Ewing & Co.]

It is laid down in all the Books on Practice, and is unquestionable, that a judgment by default is an admission of the cause of action. Tidd's Prac. 580; Bingham on Judg. 17. As a necessary consequence, upon an enquiry of damages, evidence showing that no cause of action existed is inadmissible. Now, what is the cause of action, stated in this declaration? Does it consist only in the allegation, that the defendant neglected to make the demand, and notify the parties whose names were upon the paper? Certainly not. The declaration alleges, that the notes were executed by A. Dale & Co., and were endorsed by R. F. Knott & Co. The facts, of the endorsement of the notes, and of the negligence, by reason of which the defendants failed to fix the liability of the endorsers, constitute the cause of action. If the notes were not endorsed, there could be no cause of action. For all the Bank was called upon to do, was to take the steps necessary to fix the liability of the endorsers, and if the endorsements were forgeries, the Bank could have given that in evidence under the general issue, and the action would have been defeated; the facts, therefore, that these notes were executed, were endorsed as described, were placed in the Bank for collection, and that it failed to make demand and give notice to the parties, are all necessary ingredients and indispensable parts of the cause of action as stated in this declaration.

We are of opinion, therefore, that the Circuit Court committed no error in stating that the judgment by default was an admission of the validity of the endorsement.

**Affirm the judgment.**

## TURNER vs. NEWMAN.

The 8th section of the act of 1836, ch. 43, giving an attachment in equity to an accommodation endorser or security against the principal, does not confer the remedy on a subsequent endorser against a prior endorser.

*Washington*, for the complainant.

*Garland*, for the defendant.

REESE, J. delivered the opinion of the court.

This is an attachment bill filed by the complainant, who is the accommodation endorser upon a bill of exchange drawn by G. C. Newman and R. I. Componer upon a house in New Orleans in favor of A. D. Bourne, and upon which the defendant is a prior accommodation endorser. The complainant has not taken up the bill. It is in the hands of Morgan, Allison & Co. duly protested for non-payment. The bill alleges, that Newman, the prior accommodation endorser, was at the time of its being filed, attempting to abscond and take with him his property beyond the jurisdiction of the court and the limits of the State. The bill is intended to be based on the 8th section of the act of 1836, ch. 43. That section provides, that "where any person has or shall become bound as accommodation endorser or security, and his principal is about to remove or is removing or absconding and carrying off his property beyond the limits of this State, the provisions of this act shall apply; and upon affidavit being made to the bill, an attachment shall issue, at the suit of said endorser or security, whether the debt for which he is security be due or not." His honor the Chancellor was of opinion, that this section did not embrace parties standing in the relation of the complainant and defendant, and dismissed the bill. We are of opinion that his judgment is correct. The endorsers of the bill of exchange in this case, according to the allegations of the complainant, are all accommodation endorsers, but the accommodation was not for each other, but for the drawers or acceptors: it was for the benefit of the latter that the endorsers placed their names upon the paper: they conferred no benefit upon, created no accommodation for, each other. As to

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all of them, the drawers and acceptors were principals, within the meaning of the act; and it is against such principals that the act confers the remedy in question. In whatever sense such endorsers may be held to stand towards each other, in the relation of surety and principal, according to the sequence of their names in point of place upon the paper, we think it is clear that they do not stand towards each other in that relation, within the sense and meaning of the statutory remedy. That remedy we cannot carry beyond the fair meaning of the terms used by the legislature. If the complainant, indeed, had taken up the bill, he would have been entitled to his attachment bill, not by virtue of the 8th section, but as *creditor* by virtue of the previous sections.

We are of opinion that the decree must be affirmed.

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UNION BANK vs. NEWMAN.

A Court of Chancery has no power to impound the property of the defendant, who is about to remove the same beyond the jurisdiction of the court, for the purpose of holding it to satisfy the judgment of a court of law.

*Washington*, for the complainant.

*Garland*, for the defendant.

REESE, J. delivered the opinion of the court.

This, too, is an attachment bill against the same defendant mentioned in the preceding case of *Turner vs. Newman and others*, and founded on the same facts or allegations. But the attitude of the parties differs widely. The complainants, the holders of the bill of exchange, had commenced a suit at law, by personal service, against Henry Newman and other parties to the bill of exchange, and during the pendency of that suit, Henry Newman was attempting to convey his property beyond the limits of the State. The complainants, it is admitted, do

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not come within the 8th section of the act of 1836, ch. 43. But they pray to be substituted to one Bourne, the last endorser upon the bill of exchange, who the bill alleges does not come within that section. And the complainants pray to be substituted to his rights in that behalf, if entitled to any such substitution, as to which it is not material to enquire. We have determined, that Turner, in the preceding case, standing in the attitude of Bourne, had no right, under the provisions of the act of 1836, ch. 43, to file a bill against his co-accommodation endorsers. The substitution then would avail nothing.

But it is said, this is an attachment in the nature of a *ne exeat*, and the bill could be maintained on general principles, and as auxilliary to the legal remedy. Where the subject matter of a controversy at law is about to be removed so as to defeat the legal remedy a Court of Chancery will interfere. But a suit being commenced at law, by the service of process and being pending, we are not aware that a Court of Chancery possesses the power to impound the property of the defendant for the purpose of satisfying the judgment of the plaintiff, when it shall be obtained. Indeed, since the abolishment of the *capias ad respondendum* which kept the person of the defendant within the jurisdiction of the court to satisfy the plaintiff's claim, or if he left the State, subjected his bail, there is great chance that fraudulent removals may take place, and a failure of justice ensue. It is for the legislature to supply the remedy, and it can hardly be insisted, that upon that ground, a new and hitherto unknown auxiliary jurisdiction should, as a matter of course, in every case, spring up in the Courts of Chancery.

Let the judgment be affirmed.

## OLDHAM &amp; BAILEY vs. HUNT.

A joint action of debt lies against the persons who have bound themselves by the same writing, to pay a sum of money, the one with, and the other without seal.

*Kimble*, for plaintiffs in error.

*Boyd*, for defendant in error.

REESE, J. delivered the opinion of the court.

This is an action of debt brought upon an instrument, which, as to Oldham, is a promissory note, and as to Bailey, is a bill single; that is, Bailey annexes his seal and Oldham does not. The declaration contains three counts; the first, describing the instrument as a promissory note; the second, as a writing obligatory, and the third, as a paper writing, which it sets forth in all its words and figures. The defendants demurred, and the Circuit Court overruled the demurrer. This we are satisfied was correct; for whatever misdescription of the instrument may have existed in the first and second counts, the third count describes it correctly. The contract and liability of the defendants was joint, and they can be jointly sued thereon, although one of them creates against himself evidence of a higher and more enduring character, than does the other. The simple contract of the one, does not merge in such a case, in the obligation of the other. Each continues liable to the plaintiff, and the paper writing is the common *vinculum* which makes that liability a joint one.

Let, therefore, the judgment of the Circuit Court be affirmed.

## JONES vs. LOWE.

An action of assumpsit will lie on an assignment of a bill single, under seal of assignor, which waives demand and notice.

*Ready*, for plaintiff.

*Taul*, for defendant.

TURLEY, J. delivered the opinion of the court.

The plaintiff sued the defendant, as endorser of a bill single. The action is assumpsit. The declaration charges the endorsement to have been made, waiving the necessity of demand and notice. The defendant craves oyer of the endorsement, and it is read to him, in the following words:

"For value received, I assign the within note to Willis Jones, and waive the necessity of notice or demand on the same, either in law or equity, this the 25th day of September, 1837.

CHARLES LOWE, D.":

and demurs generally. This demurrer is sustained by the court below. And for what reasons we should certainly have never found out, had it not been from the argument of the case.

From that we learn, that the assignment was supposed to be under the seal of the assignor; and that, therefore, the action of assumpsit was not sustainable. To this view of the case there are, in our opinion, two unanswerable objections:

1st. We cannot see upon what ground the assignment was held to be under seal. The declaration does not so describe it, nor the demurrer. And the thing at the end of the endorser's name, which looks very much like the letter D, we cannot, under the circumstances of the case, consider a seal.

2. But if it were a seal, we hold, that it would make no difference, in as much as there is no covenant or express contract in the endorsement, to which it would apply. It is an endorsement, passing the right to the bill single, waiving the necessity of demand and notice: but for this waiver, the endorser would have been responsible upon the dishonor of the bill, upon legal

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demand and notice. With this waiver here, he is responsible without it. This responsibility has always been held, not to be direct and immediate by the contract of the parties, but collateral and by operation of law. In such cases, we have held, that assumpsit is the only remedy. The liability being by operation of law, a seal can give no greater validity to it, and will be rejected as surplusage. If there had been in this assignment a guaranty, or any thing else, creating an obligation on the endorser greater than the law created, a seal could not be rejected, because it makes the special contract of higher dignity, and in that case, assumpsit would not lie, but covenant.

The judgment of the Circuit Court is, therefore, reversed, and case remanded for an inquest of damages.

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CANNON adm'r. vs. HOLLIS et als.

A declaration in covenant on a Constable's bond, averred the execution of a bond payable to "N. Cannon, for his life, and his successor in office:" Held, that, as exhibited in the declaration, this was not a good statutory bond, but vested in the personal representatives of Cannon, the right to sue.

This action of covenant was instituted in the Circuit Court of Wayne county, and a judgment was rendered on demurrer in favor of the defendant, from which the plaintiff appealed.

*Rose, Goode and Jones*, for the plaintiff.

*Nicholson*, for the defendants.

REESE, J. delivered the opinion of the court.

The declaration in this case, states the party plaintiff, as Rachel Cannon, administratrix of Newton Cannon, who sues for the use of Joseph Pond. The action is covenant, and the declaration states the cause of action to have arisen upon the breaches of the condition of a bond which the defendants entered into, signed and sealed, and in which they "acknowledge



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themselves held and firmly bound unto the said Newton Cannon, in his life time, and his succesors in office," &c. The defendants demurred to the declaration upon the ground, that the bond sued on, was the official bond of a Constable, made payable to the Governor of the State for the time being, and his successors in office, and that the legal title to the bond vested in the officer, and not in the person of the incumbent; and, therefore, that the personal representative of Newton Cannon has no interest in the bond whatever, nor any right or title to sue. Oyer is not craved of the bond, and, therefore, we can know no more of it, than the plaintiff has seen proper to set forth in the declaration. In that, the bond is not described as taken to the Governor of the State of Tennessee, or to Newton Cannon, in that character. It is taken to Newton Cannon and to his successors in office; but it does not appear what office he filled, or of what office succession was predicated. This bond was not taken, therefore, in terms, to the office of Governor.

We do not say, that upon just such a bond, as is set forth in the declaration in this case, the successors of Newton Cannon, in the office of Governor, might not, by proper averments, maintain an action. Upon the face of this declaration, however, the bond is not set out in terms, or by averment, as to show that it is a good statutory office bond; and, therefore, it did not, and could not vest in the personal representative of Newton Cannon, whose name is used as plaintiff in this action.

The demurrer must, therefore, be overruled, the judgment of the Circuit Court be reversed, and the case be remanded for further proceedings.

## SPURLOCK vs. UNION BANK.

To render an endorser liable, who is discharged by the neglect of the holder to give notice, there must be satisfactory proof to show, that the promise was made with a full knowledge of the discharge. It must not be left to surmise. It is wholly immaterial whether his ignorance of his discharge was the result of his ignorance of the law or the facts which discharged him.

*Turney*, for the plaintiff in error.

*Washington*, for the defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of assumpsit, brought by the Union Bank against Josiah Spurlock, as the endorser of a bill of exchange, drawn by L. A. Kincannon, and made payable at the Branch of the Farmers' Bank of Virginia, at Winchester, at six months.

The bill at maturity was dishonored, but no notice thereof was ever communicated, so far as appears from the proof in the case, to Josiah Spurlock, the endorser. This being the case, he was clearly not legally responsible for the payment of the bill as endorser; but it is sought to charge him upon an admitted liability on his part.

Upon this point the proof shows, that after the dishonor of the bill, Andrew F. Goff, the Attorney of the Bank, called upon Josiah Spurlock with this bill; and another of the same amount against him as drawer; that Spurlock paid the last bill in negroes; that Goff informed him, that he was liable as endorser upon the other bill, and that he agreed that a surplus of \$140, remaining after the payment of the bill of which he was drawer, might be endorsed upon the other, and acknowledged his liability. In further conversation with Goff, Spurlock said, one Wooden was responsible before him on the bill; talked something of paying it in negroes, and looking to Wooden for it; but ultimately said, as Wooden was responsible first, he would not do it. Is this proof sufficient to sustain an action against an endorser, upon an express promise to pay, unless he had notice, that he was legally discharged? We think not.

The law upon this point, is well understood, having been ex-

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pounded, not only by Foreign Courts, but by our own; and it would be useless now to reiterate the reasoning upon it: let it suffice, that it is held, that if an endorser, with full and complete knowledge of his discharge, promise to pay, he shall be held to his promise. But this will not be done, if the promise be made under a mistake or misapprehension of the facts, or as to the law of his liability upon them. In other words, if an endorser believe facts to exist which charge him, which do not exist, or if he believe facts, which do exist, charge him, which do not charge him, and in a misapprehension as to the operation of the law upon his case, thus supposed, promise to pay, he will not be held to his promise.

How does this principle apply to the present case?

Did Spurlock with a full knowledge, that he was legally discharged from his liability as endorser of the bill sued on, promise to pay it? We think not.

When men are to be charged upon promises made to pay a debt from which the law has freed them, there must be satisfactory proof to show, that the promise was made with a knowledge of the discharge: it will not be left to surmise.

In the case under consideration, the admission of liability and part payment, were made under peculiar circumstances. The Attorney of the Bank had called for payment of two bills, one drawn by Spurlock, for which he was clearly responsible, the other endorsed by him, from which he was, from aught that appears, as clearly discharged. He is informed by the Attorney, that he is responsible upon both, upon which he pays one and permits a surplus of \$140 to be entered upon the other, admitting his liability.

We cannot say, from this proof, that the payment and admission were made upon full and ample knowledge of his discharge from his liability as endorser. The mass of mankind know but little of commercial usage upon commercial paper, and upon questions of liability, have to depend upon legal advice. We, therefore, think it highly probable, that Spurlock's admission of liability was made upon his confidence in Mr. Goff's assertion, that he was liable.

That he did not design, as a point of honor, to pay the bill,

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knowing that he was not liable, is manifest; for in a subsequent conversation with Mr. Goff, he refuses. Upon the whole, we do not think, that the proof in this case warrants the verdict.

Let the judgment be reversed, and the cause remanded for a new trial.

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UNION BANK vs. OWEN.

A stockholder who sells his interest in the stock of a Bank, after a suit is instituted by the Bank, is a competent witness in such suit. The 3d section of the act of 1821, ch. 66, does not embrace such a case.

This action of debt was instituted in the Circuit Court of Williamson county, by the President and Directors of the Union Bank against Jabez Owen as the endorser of a promissory note. The case was submitted to a jury, Judge Maney presiding, and resulted in a verdict and judgment for the defendant. The Bank appealed.

*Washington*, for the plaintiff.

*Marshall*, for the defendant.

REESE, J. delivered the opinion of the court.

This action was brought on the 7th March, 1843, against the defendant, as endorser of a promissory note made payable to him at the Union Bank, and by him transferred to the Bank by endorsement.

On the trial, John M. Bass was offered as a witness by the plaintiffs, and being sworn and examined on his *voir dire*, stated, "that he was the President of the Union Bank of Tennessee; that on the 1st Monday of January last, he was appointed by the Governor, a State Director of the Bank; that the Union Bank had at that time some suits pending, and others were expected to be commenced, in which his testimony was import-

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ant to the Bank, as the claims grew out of negotiations in which he acted in the capacity of President or agent in behalf of the Bank, and was the organ of communication between the parties and the board. That with the view of making himself a disinterested witness, he requested Jacob McGavock to offer to Board of Directors, sixty shares of stock of the Bank for a certain piece of real estate, then held by the Bank. His proposition was accepted by the Bank, by a resolution of the Board, and he transferred to Jacob McGavock, on the books of the Bank, all his stock, amounting to some forty-five or six shares. The contract between McGavock and the Bank is not yet completed, but remains to be executed. Doubts being suggested to witness, by the counsel of the Bank, whether the above transfer of his stock and contract for the real estate were sufficient to divest him of his interest in the Bank, because he still, perhaps, had an equitable interest in the stock, he thereon executed to McGavock a full release of all his interest, legal or equitable in said stock or contract."

Upon this statement, the Circuit Court being of opinion that the witness had a joint interest with the plaintiffs at the commencement of the suit, excluded his testimony from the jury. And the only question before us is, whether in this, the Circuit Court erred?

It is not contended for the defendant here, that the facts which occurred, did not, by the general principle of law, render the witness competent. But he rests the propriety of excluding the witness, as did the Circuit Court, upon the following provision of the act of 1821, ch. 66, sec. 3, commonly called the Champerty act, to wit: "Nor shall any attorney or other person, under the pretext of having transferred their interest in real estate, or obligations for the performance of contracts, or notes for money, during the pendency of any suit at law, be permitted to give testimony in favor of those who held a joint interest with him, her or them at the commencement of the suit or suits, or by which they themselves could be released from any liability to perform contracts or pay money."

This provision, it is admitted, is marked by some obscurity, whether considered separately or in connection with the entire

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scope of the statute of which it forms a part. It is not incumbent at this time, upon the court, to endeavor by an analysis of the statute to remove the obscurity, and designate the cases, which we may deem the provision embraces. It is sufficient to show, that it does not embrace the case of Mr. Bass. The Bank was the owner of the note sued on—the sole owner—Mr. Bass was not, nor was any other stockholder joint owner with it. The ultimate fund to be distributed among the stockholders might be increased or diminished, as the note sued on, might or might not be collected; and that constituted the nature of Mr. Bass' interest. Surely this is not embraced by the words or the objects of the statute.

A legatee to the amount of one dollar under a will, has an interest to that extent in the estate, but the whole legal title is in the executor, and if he sue to collect a debt, is such legatee, by construction of the statute, to be held a joint owner of the claim sued for, and be prevented from releasing, pending the suit, so as to become a witness? A distributee has an interest in the estate, but it is not a joint interest with the administrator; and shall this statute be construed to prevent him from becoming a witness, if he release pending the suit? Can it have been the object of the legislature to have embraced cases such as those above enumerated? Clearly not. We think, releases in such cases have been of frequent occurrence since 1821, for the purpose of rendering witnesses competent, and no one has hitherto sought to repel the competency by the provision of the act of that year.

We are of opinion, that Mr. Bass should have been received as a witness; and we, therefore, reverse the judgment and remand the cause, &c.

## PERKINS vs. PERKINS.

T. Perkins executed his note to H. Perkins, ex'r. for \$200, payable when a deed should be made to him for a town lot by the heirs of said H. Perkins. Held, in an action brought on this instrument, proof of the tender of a deed from the devisees of H. Perkins, and proof that they were sole owners, would not authorize a recovery. The defendant was entitled to a deed from *the heirs*, according to contract.

This action of debt was brought in the Circuit Court of Williamson County, by H. Perkins, executor, against T. Perkins; Maney, Judge, presiding.

A verdict and judgment were rendered against the plaintiff, from which he appealed.

*Alexander*, for the plaintiff in error.

*Marshall*, for the defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of debt brought against the defendant in error upon the contract of his testator Thomas H. Perkins, which contract is in the words following: "On or before 1st January next I promise to pay to Hardin Perkins, executor of Daniel Perkins, deceased, two hundred dollars, provided the heirs of said Daniel Perkins shall execute a quit-claim deed to me, my heirs or assigns, to and for a certain lot in the town of Franklin, formerly owned by me and Wm. Short. 6th July; 1837. T. H. Perkins. [Seal.]"

To this suit, defendant pleaded, among other things, that the heirs of Daniel Perkins did not execute a quit-claim deed to Thomas H. Perkins, his heirs or assigns, before the commencement of this suit, for the lot mentioned in the writing obligatory. On the trial, the plaintiff proved that a quit-claim deed for the premises had been executed by a portion of the heirs of Daniel Perkins; and proposed to prove by his will, that they were the sole owners of the lot as devisees under the will. This the court refused to permit, and we think correctly. The defendant's intestate had contracted for a conveyance from all the heirs: and upon what principle could the court change his con-

[*Baker et als. vs. Dodson.*]

tract, and force him to be charged upon a conveyance from a part? Upon the principle it is argued that this part were the real owners as devisees of the whole property contracted to be conveyed, and that no benefit would have been received from a conveyance by the others. How could it be known that they were devisees? From an inspection of the will? Surely not. It might have been denied that the will was a valid one. Was an issue to be made up to try the question in an action of debt? It would have presented a strange spectacle. But it is all sufficient to say, the defendant's testator had the right, if he did not think proper to trust to a conveyance from the devisees under the will, to contract for one from the heirs at large; and that having done so, he cannot be compelled to pay the money, until the terms of the contract have been complied with by the plaintiff.

Let the judgment be affirmed.

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-*BAKER et als. vs. DODSON.*

To make a nuncupative will good, it is not necessary that the testator should have specially required two persons to bear witness to his disposition of his effects in the words of the statute. It is sufficient if there exists in his mind at the time a fixed purpose to perform a testamentary act, and that two persons feel themselves called upon by the language addressed to them to notice the disposition of his effects.

At the September term, 1841, of the County Court of Maury county, Eliza Dodson, the widow of William R. Dodson, presented for probate the alleged nuncupative will of said Dodson, deceased. At the next term of the court, Baker, and wife, who was a sister of the deceased, appeared, and others, the brothers and sisters of deceased, and contested the said alleged will; and an issue having been made up, the case was certified to the Circuit Court of Maury county for trial. At the January term, 1843, Dillahunt, Judge, presiding, the case was submitted to a jury. It appeared, that Dodson married in 1840, and died in 1841, leaving a widow and no children or parents, but brothers and sisters. Dodson was taken sick at his own house in



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Maury county; and on Monday night, the 23d day of August, 1841, he exclaimed: "I am gone—I am lost." He then remained silent some fifteen minutes, when Boyd and Hays came in. He addressed himself to them without calling them by name, saying: "I wish to make a disposition of my effects." He then proceeded to dispose of his effects. He said he had a nephew in Texas, named after him; to whom he gave something. He said he wished Mrs. Overton, who had waited on him, to be well paid for her services, and the balance of his estate something upwards of a thousand dollars in value to be given to his wife. He assigned as a reason for giving her his whole estate, that he had treated her badly on some occasions, and wished to do her justice in the disposition of his estate. He died on Friday night following. This is the substance of all testimony on the point, on which this case was determined in the Supreme Court.

A verdict was given establishing the paper offered for probate, as the nuncupative will of the deceased. A motion was made for a new trial. This motion was overruled, and a judgment rendered on it. The defendants appealed.

*Thomas*, for plaintiffs in error. *Williams on Executors*, 58, 61; 2 *Ecl.* 229; 1 *Ecl.* 230; 6 *Ecl.* 253; 10 *Yerg.* 601; *Swin. on Wills*, 59, 355, 356; *Kent's Com.* 517.

*D. Campbell*, for defendant in error.

**REESB**, J. delivered the opinion of the court.

The question in this case is embraced within narrow limits. It turns upon the sufficiency of the proof, and the accuracy of the charge to the jury as to what is technically called the *rogatio testium* of a nuncupative will propounded for probate. Two witnesses, John B. Hays and Laird H. Boyd, testified, that the deceased, addressing himself to them, said: "I wish to make a disposition of my effects"—and then went on to declare the nuncupation.

They felt and understood themselves by such address to

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them, and the language used, to be called on specially to notice the *factum* of the will. The will being made, the deceased explained to them the reasons and motives which produced the particular disposition. There is no doubt, from the testimony of these witnesses, that it was the fixed purpose of the party to perform, and that he believed, he was performing, a testamentary act.

The leading object of the 15th sec. of the act of 1784, as to the special requirement to bear witness, or the *rogatio testium*, is doubtless to distinguish between a valid nuncupation, and casual conversations by one in his illness, as to his wishes on the subject of his property, and to guard against the latter being imposed upon the court as testamentary. But it is not necessary for such purpose, that the testator (if he may be so called) should know or quote the very language of the statute. It is sufficient, if by intelligent act and language, he invoke their special attention and attestation to what he is going to say, or to what he has said. If he address them, and say, I wish to make a disposition of my effects, and go on then and make the *factum* of said disposition, we cannot say, that the statute has not been complied with.

The court charged that it would be sufficient, if one witness heard and proved the *rogatio*; and such charge does not appear to be contrary to the authorities found in the Ecclesiastical Reports.

This court said, in the case of *Tally vs. Butterworth*, 10 Yer. 503, *obiter et arguendo*, that *perhaps* all the witnesses must hear and prove the *rogatio*.

It may be, that this is not necessary. It is not material, however, as it seems to us, to decide the point: for here, two witnesses both heard and proved the *rogatio*.

Let the judgment be affirmed.

## CRUTCHER vs. WILLIAMS.

The defendant pleaded *nil debet*, payment and set-off in short, to an action of debt; and plaintiff filed replications to the pleas also in short; and the jury returned a verdict that the defendant owed the debt in the declaration mentioned. Held, that this verdict did not dispose of the whole defence, and could not stand.

*Marshall, Campbell and Foster*, for plaintiff.

*Cahal and White*, for defendant.

TURLEY, J. delivered the opinion of the court.

This is an action of debt brought by Charles P. Williams against Henry L. Crutcher, to recover back a sum of money paid by him upon legal proceedings in the State of Mississippi, which were set aside and annulled afterwards by the Supreme Court of that State.

To this action, defendant pleaded in short, *nil debet*, payment and set-off, no notice of the pendency of the writ of error; to all of which there are replications and issues also in short.

The jury in their verdict found the issue of *nil debet* in favor of the plaintiff, without noticing the others, upon which judgment was given by the Circuit Judge. This is erroneous. It has always been held, that when there are several issues, they must all be found by the jury before judgment can be pronounced. It is true, this need not be done in specific terms. The words, "find the issues," have been held to be sufficient. But in the case under consideration, the jury say they find the defendant owes the debt in the declaration mentioned. This only negatives the plea *nil debet*, leaving the issues upon the pleas of payment, set-off, and want of notice, undisposed of. It is true, these pleas are in short, and need not, as we have held, have been noticed by the plaintiff; in which case we would not have noticed them: but he has chosen to consider them as pleas; and having done so, we must do so likewise, as has been often determined by the court. The verdict of the jury, then, not disposing of the whole defence, no judgment could be entered thereon.

Judgment reversed, and case remanded for a new trial.

## FOSTER vs. HALL &amp; EATON.

1. Where an attachment bill states the amount of the defendant's indebtedness, it is not necessary the affidavit should state it.
2. The term *domicil* has a more extensive signification than the term *residence*. In addition to a residence, it embraces within its meaning the intention of making *that residence* the home of the party.
3. If the complainant in an attachment bill fail to state in his bill or affidavit attached thereto the amount of the defendant's indebtedness; or if defendant be not a non-resident, and the defendant answers, he waives those objections. They are matters which should be pleaded in abatement.
4. A person, who endorses for the accommodation of the firm, having taken up the notes, becomes thereby the creditor of the firm, and has a lien on the partnership effects as against the separate creditors of the partners, for his reimbursement.
5. The filing of an attachment bill by one member of a firm against the others, dissolves the firm: not so where a creditor files the bill and attaches the property of the firm.
6. To render a firm responsible for a note given by one member thereof, in his own name, it must appear that the credit was given to the firm and that the money obtained by the note went into the business of the firm; otherwise it will be treated as an election by the creditor to trust to the responsibility of the maker of the note alone.
7. When one member of a firm executes his individual note to obtain money, he is not a competent witness to prove that the money was obtained on the credit of the firm and went into the business of the firm.

The record in this case having been mislaid, the reporter is unable to give any fuller statement of facts than that contained in the opinion of the court.

*Fogg*, for the complainant.

*E. H. Erving*, for the defendant.

GREEN, J. delivered the opinion of the court.

This is an attachment bill, filed by virtue of the act of 1835-6, ch. 43, C. & N. 106, and 1837-8, ch. 166, sess. acts, 234.

The affidavit does not *state* the indebtedment of the defendant, but states that "the allegations contained in the foregoing bill, so far as they are stated on his own knowledge are true, and so far as they are stated on the information of others he believes to be true."

The *bill* sets out particularly the various items in which it is alleged the defendant Eaton is indebted to the complainant.

The *proviso* to the first section of the act of 1835-6 requires

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that the complainant shall make affidavit, that the defendant is indebted as charged in the bill, and is a non-resident. It is then the duty of the officer having the attachment, to levy it, and take into his possession so much of the personal property of the defendant as is necessary to satisfy the complainant's claim. The act of 1837-8, ch. 166, is amendatory of the above recited act; and among other things, in the third section requires that "the complainant shall set forth in his bill the amount of his demand, and the Judge in his *fiat* shall direct so much of the property and effects of the defendant to be attached as is sufficient to satisfy such debt and costs according to the complaint, and if the sheriff shall make an excessive distress or levy, he shall be liable therefor." Whatever, therefore, may be the meaning of the proviso, the first section of the act of 1835-6 as to the statements it required a party to make in his affidavit, it is clear that since the act of 1837-8, it need only verify the facts stated in the bill.

The object of the legislature, in requiring that the amount of the demand should be particularly set forth, was that an excessive levy need not be made. This is shown by the proviso to the act of 1835-6, where the officer is required to attach *so much* as is sufficient to satisfy the demand. And this is more clearly shown in the third section of the act of 1837-8, where the Judge is required, in his *fiat*, to direct so much of the property and effects of the defendant to be attached as is sufficient to satisfy the debt; and it is declared that the sheriff shall be liable, if he makes an excessive levy.

This being clearly the only reason for requiring that the amount due the complainant should be stated so particularly, it is plain that the statement *in the bill*, which is required by the third section of the act of 1837-8, is all that is necessary to accomplish that end, and is all the legislature designed should be done. When the bill is sworn to, the facts, verified by oath, are as distinctly stated as if the sum due were again set forth in the affidavit.

We think, therefore, that it is not necessary that the affidavit should state the sum in which the defendant is indebted to the complainant.

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It is insisted, that the defendant Eaton was not a non-resident of the State at the time the bill was filed. The proof is, that he had been Governor of Florida, residing in that Territory; Minister of the United States to Spain, residing some years at Madrid, and was, at the time this bill was filed, living with his family in the District of Columbia. Mr. Hall states in his deposition, that the defendant Eaton, in the autumn of 1840, gave direction for the transfer, from Nashville to Washington, of various articles of household furniture, and a female slave to serve him as a cook; and that he removed from Nashville in November or December, 1840, and took up his residence at Washington. The witness not only states the fact, that the defendant's residence was in Washington, but he couples with that statement, a detail of circumstances from which the court can see that the *intention* of the defendant, most probably, was to make his permanent domicil at that place. But domicil is a term of more extensive signification than residence; for to constitute a domicil, two things must concur: first, residence; and secondly, the intention of making it the home of the party. Story's Conflict L. 344. And we think both these facts concurred at the time this attachment was sued out.

But we consider the discussion of these preliminary questions to have been unnecessary, because they are both matters in abatement, of which the defendant should have availed himself by proper defences, on his first appearance in the cause.

But he has answered the bill, making an issue upon the merits; and this is a waiver of all objections to the jurisdiction, except such as show that the matters upon which a decree is sought are not fit for the cognizance of a court of chancery.

We now come to the consideration of the questions upon which depend the merits of the cause.

The bill charges, that in 1836, Allen A. Hall, John H. Eaton and Edward Breathitt entered into a partnership in a distillery in Davidson. In 1837, Edward Breathitt died. Hall and Eaton carried on the partnership; and in the prosecution of their business, executed various notes, which were endorsed, for their accommodation, by the complainant: notes were executed by other persons for the benefit of Hall and Eaton, and at their

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request endorsed by the complainant, for their accommodation. The complainant has paid, and otherwise so arranged as to satisfy the holders of these notes, and has taken them up; whereby Hall and Eaton are indebted to him for the same, amounting to upwards of twelve thousand dollars.

Eaton insists that there was no partnership between himself and Hall, after the death of Breathitt; and as all the notes mentioned in the bill were executed subsequent to that time, he is not responsible for any part of the debt claimed by complainant.

This brings us to the consideration of the facts in relation to the partnership. By the articles between Hall, Eaton and Breathitt, their partnership was entered into the 30th day of May, 1836, and was to expire the 14th of February, 1839. Breathitt died the 31st of January, 1837. Eaton being at that time at Madrid, in Spain, various letters from Eaton to Hall were produced and read in evidence in the court below, the first dated the 10th of March, 1838, and the last the 20th of October, 1838.

These letters were written in relation to the business of the distillery; speak of Breathitt's death, and of continuing the concern; and advise as to its future management, and as to the means for raising funds to carry it on.

In the letter of the 10th of March, 1838, he informs Hall that he had made arrangements to pay the note of \$3,500; urges him to press every sail to the breeze to "place *our* whiskey ship in some better trim;" and advises, that an effort be made to borrow 10,000 dollars for the concern; authorizing Hall, in addition to the partnership property, to pledge for that purpose a portion of his private estate.

In a letter dated 25th March, Hall is again advised to borrow 8 or 10,000 dollars, at one and two years. In the letter of the 2d June, the wish is expressed that he were at home, to "aid, assist, and think of matters," but would not come until Hall should give a more flattering representation of the condition of things. "The rest," he says, "must repose with your own good sense, and judgment, and prudence, which, I crave to say, ought to be placed in full requisition; or, if not, both you and

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your friends will be crippled, if not destroyed." In a letter of the 6th of October, Hall is told, "the winter is coming on, and you will need grain to go ahead. On this day week I will have arranged and forwarded to H. Toland \$3000 for you."

In the letter of 20th October, 1838, he informs Hall, that he had forwarded to H. Toland \$2,500, and adds: "The season for your action is at hand, and it is sent to enable you to get along. I send this amount, that *our* affairs may go ahead; and to this end, lay out 1,800 or 2,000 dollars in rye at least."

These extracts, which might have been greatly extended, establish beyond any doubt, the existence of a partnership after the death of Breathitt. The argument, that these letters are to be regarded in the light of a proposition to Hall, which there is no evidence he ever accepted, when we examine their true character, is entitled to no weight. The letters acknowledge the receipt of communications from Hall upon the subject; and, instead of holding the language of a *proposal*, they every where speak of a *subsisting business*, understood by the parties, and in which the writer's interests were deeply involved.

The truth appears to be, that after the death of Breathitt, the surviving partners chose to go on with the business, without settling up the old concern, and without any definite stipulations as to their rights and liabilities. Whether they were in error, as to the effect of Breathitt's death upon the rights and liabilities of the parties, we are not informed, nor can it make any difference as to their liability to third persons.

But it is said, that a portion of the notes set out in the bill, which were executed by Hall, in the name of Hall and Eaton, was made to renew notes which the old firm of A. A. Hall & Co. had contracted before the death of Breathitt; that Foster, the endorser, was aware of this fact, and that Eaton is not bound for their payment. The legal principles which govern in partnership transactions of this sort, do not seem to be matter of controversy between the counsel; and it is not contended by the counsel for complainant, that a partner can bind his co-partner by a contract in the partnership name, to pay the debt of a third person, for which the parties were not previously bound.



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If Eaton had not been a partner in the firm of A. A. Hall & Co. and Hall had paid the debts of that firm, by securities executed in the new partnership name of Hall & Eaton, most certainly Eaton would not have been bound; and such notes would have extinguished the old debt of A. A. Hall & Co. and the creditor would have been left with his remedy against Hall only. But the situation, and consequently the liability, of the parties are very different, when we come to look at the facts of the case. Here, the firm of A. A. Hall & Co. owes debts, and Hall & Eaton, the two surviving members of the firm, after its dissolution by the death of Breathitt, carry on the same business, by the use of the property and effects of the old concern; and Hall, the acting partner, executes the notes of the firm, to take up the notes of the old concern. Both the partners of the new firm were bound for the debts of the old one; and although these notes were given in a different partnership style, still they are the undertaking of persons who were equally bound by the old note; so that, in fact, they are the notes of Hall & Eaton, made to renew notes which both Hall & Eaton previously owed. It is manifest, that the principle upon which the defendant has so much insisted, has no application to this case. But it is insisted, that if Eaton became the partner of Hall after the death of Breathitt, he did not become such partner until his letter of the 10th of March, 1838, reached Hall, and that the partnership expired the 14th of February, 1839, that being the period limited for the partnership of A. A. Hall & Co.

It has been previously shown, that the letters of Eaton are not in the nature of a proposition to Hall for a partnership; but contain a recognition of rights and liabilities in regard to the business, as it had been conducted from the period of Breathitt's death. As to the period of its expiration, the articles of the old firm could have no effect: for although it was the same business continued, yet it was not continued by virtue of the old contract, but grew out of the acts of the parties, and their mutual recognition of the existence of such a partnership. It cannot depend, therefore, on the limitation contained in the articles creating the firm of A. A. Hall & Co. for its duration, but can only be dissolved by some subsequent fact, which the law

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holds will put an end to a partnership: and in this way the defendant Eaton most certainly understood the matter. How else shall we account for the advice in his letter of March, 1838, that Hall should "keep the year's supply for rye." If *he* understood that the partnership would expire in February, 1839, it is difficult for us to understand, why, in a letter written less than *one* year before that time, he should have urged the propriety of keeping a *two* year's supply of rye. Again, in his letter of the 20th of October, 1838, less than four months from the period it is said the partnership was to terminate, he says, "lay out \$1800 or \$2000 in rye, at least." This he wished to be done, that their affairs might go ahead. It is impossible to conceive that while giving these directions, the writer could have contemplated the termination of the partnership in February, 1839.

But it is insisted, that the bill filed by Mrs. Breathitt against Hall & Eaton, for a settlement of the firm of A. A. Hall & Co. and the attachment of the partnership effects by order of the Chancellor, wrought a dissolution of the firm of Hall & Eaton.

We are unable to perceive the force of this proposition. Certainly, the fact that a creditor files a bill against a firm, and causes its property to be attached, can have no effect upon the legal relation of the members of the firm. It may interrupt the operation of their business; but it cannot dissolve the partnership.

If Mrs. Breathitt had been a member of the firm, and as such had filed her bill against the other partners for an account, the case would have been entirely different. But *here* she is a creditor; the representative of one of the partners in the late firm of A. A. Hall & Co.; and as such her bill is filed against the surviving partners for an account of that business. However, therefore, it may interrupt the business of Hall & Eaton, by the attachment of their effects, it cannot alter the relation of partners, nor take away the power of each to bind the firm, by a contract in the name and for the benefit of the partnership.

We conclude, therefore, that the defendant Eaton was the partner of Hall from the death of Breathitt until Eaton denied his responsibility for the notes, in the fall of 1840, or until Mrs. Breathitt and Hall joined in the application for the sale of the

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effects. It follows, that he is responsible as partner, for all the notes which were executed by Hall, in the name of the firm of Hall & Eaton, that are specified in the complainant's bill; and as the complainant has satisfied and taken up these notes, he has become himself the creditor, and the defendant Eaton is his debtor.

We come next to consider the questions which are presented in this bill, in relation to those notes which were executed in the name of Hall alone, and in the name of other persons, but which the bill alleges were executed by the parties and endorsed by the complainant for the benefit of and at the request of the firm.

In the case of *Emmerson & Crouch vs. Bowman*, (3 Hump. Rep. 209,) this court held, that where a note is executed in the name of one member of a firm, as a general rule, the other members of the firm will not be bound thereby; that to bind them all, it must be executed in the firm name, unless it be shown that credit was given to the firm and that the money went into its business. The principles announced in that case are supported by the authorities: Judge Story, (Com. Part. s. 102,) speaking of the power of a partner to bind his copartners, says: "All such contracts and engagements, acts and things, he has authority to make and do in the name of the firm; and, indeed, in order to bind the firm, they must ordinarily be made and done in the name of the firm; otherwise they will bind the individual partner only who executes them as his own private acts, contracts, or other things." Again, s. 140, he says: "If a person should advance money for a firm, and yet take the security of one partner therefor, the security would bind that partner only; and, indeed, if the separate security is knowingly taken upon advances for the firm, it will ordinarily be treated as an election by the creditor to absolve the partnership from responsibility, and to confine the credit to the partner only; nor will it make any difference in such a case, that the money has not only been borrowed, but has been applied to partnership purposes. On the other hand, if money is actually borrowed on the credit of the firm, in the course of the business of the firm,

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it will make no difference in the liability of the other partners, that it has been misapplied by the borrowing partner."

In Collyer on Partnership, (ch. 2, s. 2, p. 262,) it is said: "If a person advance money even for the purposes of a firm, but takes the separate security of one partner, the partnership not being carried on in that partner's individual name, the contract as evidenced by such individual security is several, and a several action only can be brought upon it." Again, at the same page, it is said: "If a person advance money to the firm, and take the separate bill of one partner, he cannot sue the firm on that security, although he may possibly succeed in an action against the firm for money advanced on the bill: the contract is several, and the individual partner alone can be sued."

It is clear, from these authorities, that where money is borrowed for a firm, and the individual note, or bill of one partner only, is taken, that partner alone will be responsible upon the note or bill; and in order to hold the firm liable for money advanced, it must appear that it was obtained for the firm, and on the *credit* of the firm; otherwise "it will be treated as an election by the creditor to absolve the partnership from responsibility, and to confine the credit to that partner only."

In relation, therefore, to the notes upon which Eaton's name does not appear, he cannot be held directly responsible. But as the complainant has paid those notes to the creditors who advanced the money, having been liable therefor as endorser, he insists that he thereby became a creditor of the firm for money advanced. The question then arises, was this money advanced for the firm and upon its credit?

Upon this subject we have only the testimony of Hall, one of the partners. It is unnecessary to examine and criticise his evidence, as we are of opinion he is not a competent witness to prove the facts in question. Hall is clearly responsible to the complainant upon these notes. He is a party to them, in his individual character, and from any thing that appears, (unless we look to his testimony,) the complainant endorsed them upon his individual responsibility alone.

If he is permitted to prove that the money was advanced up-

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on the credit of the firm, he thereby shifts the responsibility of one half this debt from his own shoulders and places it upon the defendant Eaton: and if Eaton should be compelled to pay it, how is he to recover it back if by Hall's testimony he shall be improperly charged? Clearly he would have no remedy: true, if he could prove that Hall had sworn falsely, and that the money was not obtained for partnership purposes and upon the credit of the firm, he might recover the amount from Hall in an action for money had and received. But where is he to get the proof? If there was other testimony than that of the parties, there would have been no necessity for resorting to Hall's evidence in this case. This question is in principle precisely the same, decided by this court, in the case of *Vanzant vs. Kay*. (2 H. R. 109.) It is true, the court say in that case, that where the partnership is proved by other evidence or admitted, the plaintiff may call one of the partners to prove other parts of the case. The reason given, is, that "in such case the witness is interested to defeat the plaintiff's claim, because he will be liable to contribution, should there be a judgment against his co-partner."

But so far as these notes are concerned, it is the same thing as if the partnership had not been proved by other evidence.

If a suit had been brought at law against Eaton upon these claims, for so much money advanced to the firm, no one would contend that Hall could be a witness to prove they were partnership transactions. But can the fact that they are brought before this court, in connection with other claims, in which the partnership is established, make any difference? Surely not. If Hall were competent in this case, every partner might make his copartners responsible for his private debts, by his own evidence, provided he and the creditor were base enough to combine for that purpose.

If, therefore, in any state of the proof, Eaton could be made directly liable to the complainant, (of which there is some doubt) it is clear that upon the competent evidence in this record, he cannot be regarded as the debtor of the complainant, so as to authorize a recovery in this attachment bill.

Hall has a lien upon the partnership effects for the payment

[Rains vs. McNairy.]

of the debts of the firm; and Foster, having paid these notes, may work out his equity against Eaton, through Hall. Story on Partnership, s. 326.

We are of opinion the decree is erroneous, and that it be reversed, and reformed according to the principles of this opinion.

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RAINS vs. McNAIRY.

Where one joint owner of a chattel sells the entire chattel and delivers possession to the purchaser, it is a conversion, for which trover lies.

John McNairy and Francis McNairy were the joint owners of a jackass. A judgment was obtained in the Circuit Court of Davidson county by Stout against John McNairy, and a *fi. fa.* was issued thereupon, and levied on the animal, by Rains, sheriff of Davidson. F. McNairy attended on the day of sale and forbade the same, but the sheriff sold the entire interest in the animal and delivered him to the purchaser.

Francis McNairy instituted thereupon this action of trover in the Circuit Court of Davidson county against Rains, and a verdict and judgment were rendered, Maney, Judge, presiding, in favor of the plaintiff, for the sum of \$300, that being the estimated value of his interest in the animal. The defendant, Rains, appealed.

*Fletcher*, for the plaintiff in error. The plaintiff in error, Rains, asks for a reversal of the judgment of the Circuit Court upon these grounds, to wit:

1. As John McNairy owned the one half of the jack, it was his duty to levy the said execution on him, and his duty also to sell him.

2. He could only sell such an *interest*, or *whatever interest*, the said John S. McNairy had in him; and no sale that he could or did make, could or did deprive the defendant in error of whatever interest *he* owned in the jack; and therefore whatever interest defendant in error had in said jack before the sale, he still retained after the sale.

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3. If John S. McNairy and Francis McNairy were tenants in common of said jack, then the purchaser at the sale became a tenant in common with Francis McNairy; and being such, he had as much right to the possession of the said jack as the said defendant in error had; and, consequently, the sheriff did no wrong in delivering said jack to the purchaser. They were tenants in common; and defendant in error still has his interest in said jack, has not been divested of it by the said sale, and can proceed by bill against his co-tenant, or otherwise, to secure his interest, should he apprehend loss by removal or other improper conduct. See Story on Partnership, page 584 and section 414, and all from page 373 to 382. See Watson on Partnership, 98, 102 and 106.

4. Another ground. One joint tenant or tenant in common cannot sue another tenant in common *in trover* for the sale and delivery of the chattel so jointly owned. 1 Chitty on Pleading, 66, 155; 2 Johnson's Reports, 468; 16 Johnson's Reports, 106, and note c, where all the cases are reviewed; 15 Johnson, 179.

Rains by his levy acquired an interest in said jack; and the moment he made that levy became, in the place of John S. McNairy, a tenant in common of said jack with defendant in error; and if one tenant in common cannot maintain trover against another, then this action cannot be sustained, and the judgment of the Circuit Court must be reversed. Story on Partnership, 379. See 5 Yerger, as to the interest acquired by the sheriff by a levy. 16 Johnson, 101, note c, where all the cases are reviewed.

*Andrew Ewing*, for defendant in error. The only question in this case is, whether one tenant in common of a chattel can sue a sheriff for executing, selling and delivering the whole chattel on a separate execution against his co-tenant. The original doctrine was, one tenant could only sue his co-tenant in case of the loss or destruction of the chattel; but the modern decisions have so far extended the meaning of these two words as to make them include a sale of the whole chattel and its delivery to a third person. See 1 Barn & Adol. 395; 9 Wendell, 354; 3 do. 398; 21 Pickering, 559; 15 Mass. 82; 21 Wendell, 76;

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6 Vermont, 452; 1 Kent's Commentaries, 351, note; 13 Maine Reports, 196.

GREEN, J. delivered the opinion of the court.

Francis H. and John S. McNairy were joint owners of a jackass, upon which Rains, the sheriff, levied an execution in his hands against John S. McNairy. F. H. McNairy forbade the sale, claiming the ownership of one half; but the sheriff sold and delivered to the purchaser the whole jack; whereupon this action of trover was brought.

The plaintiff recovered for one half the value of the jack in the Circuit Court, and Rains, the sheriff, appealed to this court.

It is now insisted; that the sheriff had a right to take and deliver the jack to the purchaser, by virtue of the execution against John S. McNairy; that the purchaser became joint owner of the jack with F. H. McNairy, the sale of the entire property having, in fact, transferred only the one half; and as a consequence of these propositions, it is contended that there has been no conversion, and that no action lies by one tenant in common against the other.

Each co-tenant having a right to the possession, cannot be sued by the other part owner, unless there has been a conversion of the property; and the older elementary books hold, that a sale by one co-tenant of the entire property does not amount to a conversion, but that its destruction would.

It is argued, that as the sale by one tenant in common of his co-tenant's share, passes the interest of the vendor only, the interest of the other co-tenant still remains in common with the purchaser, and therefore there can be no conversion by the act of sale. Bac. Abr. *Trover*. Salk. 292; 1 East, 367; Littleton, §323. And this doctrine was maintained in the case of *Morreau vs. Norton*, (15 Jh. Rep. 179,) where it was held, that a sale was not such a destruction of the property as to destroy the tenancy in common.

But the more recent American cases hold, that as the assumption of authority over, and actual sale of the property by a stranger, will constitute a conversion, so the assuming au-



[*Bains vs McNairy.*]

thority to sell, and actually making sale of the interest of another, under a claim of title in the vendor, although he be part owner, may be taken to be a conversion, for which an action of trover will lie. *Weld vs. Oliver*, 21 Pick. 559; *White vs. Osborne*, 21 Wend. R. 72; *Melville vs. Brown*, 15 Mass. 82; *Lucas vs. Wasson*, 3 Dev. R. 398.

It is true, such sale does not vest in the purchaser any greater interest than that of the party making the sale; and the co-tenant, who is not consulted, may so consider it, and take the property when opportunity offers; but he *may* sue in trover for the conversion, and thereby vest in the purchaser the entire property 21 Wend. R. 77.

In a late case (*Waddell vs. Cook*, 2 Hill's R. 47,) an action of *trespass* was sustained against the marshal, Waddell, for seizing and selling goods of Cook under a *fi. fa.* against Bowne, who was a joint owner of the goods with Cook. The court held, that though the marshal's authority extended to a total dispossession of both the co-tenants by an execution against one, yet the law denied him the right to *sell* the entire property. "In attempting to do so, though the act be nugatory, yet the law may well treat it as such an abuse of legal authority, as renders him a trespasser *ab initio*. 2 Kent, 351, note b, 4th ed.

We therefore think this action was well conceived, and affirm the judgment.

*CANNON, adm'r. vs. SNOWDON et als.*

Where a Constable's bond is taken, payable to the Governor, for the time being, and his successors in office, the right to sue vests in the successor, and not in the personal representative of the deceased; and if the bond be not statutory, and suit be brought in the name of the personal representative, the facts which give the right to the personal representative to sue must be exhibited in the declaration or a demurrer lies.

This is an appeal from the judgment of the Circuit Court of Wayne county.

*Rose*, for plaintiff. It is objected, that the declaration shows that the bond is payable to Newton Cannon, Governor, and his successors in office, and the action is brought by Rachel Cannon, administratrix. In the case of *Polk, Gov. vs. Plummer and others*, 2 Hump. 500, this court decided that the office was the payee in all bonds taken for the public benefit, and not the person of the Governor; but it does not necessarily follow, that the bond would go in succession; because, if not a statutory bond, the legal title would be in the person of the Governor, and go to the legal representative. The requisitions of the statute must be complied with in all essential points, to make it a good statutory bond. 6 Yerg. 363. And the only difficulty in this case seems to be, to determine whether or not this bond is statutory. It is said that the description in the declaration shows it to be a statutory bond. But this is denied. The declaration does not disclose facts sufficient to show a compliance with the statute in all essential points. 2 Yerg. 113; 6 Yerg. 363. The words in the declaration, "Governor of the State for the time being, and his successors in office," may be well rejected as surplusage. 11 East, 62; 3 Bar. & Adol. 655; 1 Term Rep. 235; 7 John. Rep. 462; 13 John. Rep. 80; 1 Chitty's Plead. 263; 8 Cowen's Rep. 42; 2 Hump. 506.

It is insisted, that if the bond is a statutory bond, the defendant should have craved oyer and set out the bond, and condition, and demurred. 2 Saunders, 60, (note 3); 2 Term R. 575; 8 John. Rep. 410. The profert in the declaration does not make the bond a part of the declaration, and this court cannot by an inspection of the record, see that the bond is taken in compliance with the requisition of the statute, and if the bond

[Cannon adm'r. vs. Snowden et als.]

is not statutory; the suit should be brought in the name of Newton Cannon, or his personal representative. *Tibbitts vs. Canada*, 10 Yerg. Rep. 465.

It is insisted, that the defendants should have pleaded specially, in defence, that the bond sued upon, was a statutory bond, and have set the same out in a special plea, so the court, upon a demurrer to the plea, would have had the question fairly before it, or so the plaintiff could have replied by tendering an issue, either to the country or court.

It is also insisted, that the plaintiff had a right to select the form of action, or in other words, the action would have been properly brought, either in the name of the successor of Governor Cannon or his legal representative. 10 John. Rep. 400; 13 Mass. Rep. 477, and authorities there referred to.

*B. S. Allen and Nicholson*, for defendants.

~~REES~~, J. delivered the opinion of the court.

This is an action of covenant, brought by the personal representative of Newton Cannon against Hollis and his sureties as Constable.

The declaration sets out the bond which was signed and sealed by the parties defendant, and by which they acknowledged themselves to be held and firmly bound unto Newton Cannon, Governor of the State of Tennessee, and his successors in office, in the sum of, &c. And proceeds to describe a good official and statutory bond of a Constable. The defendant demurred, upon the ground mentioned in a previous case, and determined in the case of the *Union Bank vs. Plummer*, that these official bonds, taken to persons in office, having succession, vest in the office, and do not, and cannot vest in the person of the incumbent. The Circuit Court sustained the demurrer, and the plaintiff has appealed to this court in error.

The principle upon which the judgment of the Circuit Court was founded, has not been questioned by the plaintiff's counsel, but it is contended, that the bond might not have been taken by and acknowledged before the county court, and might not

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therefore be statutory. This is possible, but not shown. The declaration contains all which would be necessary to maintain the action as a statutory bond. It is upon the face of it, and as described a statutory bond. *Prima facie* it vests in, and belongs to the successor of Newton Cannon, to the office. And those, therefore, who alledge the title of Mrs. Cannon, the personal representative of the private individual, Newton Cannon, must show the grounds upon which that title exists. Having stated such facts as vest the title elsewhere, they must not stop there, but state also those facts which bring back their title again, and re-vest it. This they have not done.

The demurrer, therefore, was properly taken, and correctly sustained, and the judgment of the Circuit Court will be affirmed.

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#### HERRING & BIRD vs. POLLARD'S ex'rs.

Herring & Bird took possession of land under a parol purchase from Pollard, and made valuable improvements thereon, intending in good faith to complete the contract. The execution of the contract was frustrated by a disagreement of the parties: Held, that Pollard was liable to account to them for the value of improvements placed on the premises during his occupation of them.

This bill was filed in the Chancery Court at Clarksville, and was heard on bill, answer, replication and report of the Clerk and Master at March term, 1843, Chancellor McCambell presiding. He allowed the value of improvements to complainants, and decreed accordingly, from which the defendants appealed.

*Kimble*, for complainants.

*Johnson*, for defendants. See 5. John. 388, 416; 3 A. K. Marshall, 389; 4 Bibb; 3 Dess. 245; 6 Monroe, 567; 2 Bibb, 45; 3 Bibb, 289; 1 A. K. Marsh. 389.

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GREEN, J. delivered the opinion of the court.

The complainants agreed, verbally, to purchase a tract of land, in Montgomery county, from the defendant, and in part payment therefor conveyed and delivered him a negro woman and child, at the price of \$800. They went into possession of the land and made valuable improvements. They also enjoyed the farm, and sold a quantity of valuable timber.

When a written contract was about being made between the parties, a misunderstanding of each other existed; the complainants insisting on having a deed, and the defendant being willing only to give his bond for a title when the purchase money should be paid. Whereupon the complainants filed this bill, asking to be restored to the enjoyment of the property that had been delivered to the defendant in payment for the land, and for compensation for improvements made upon the land.

The Chancellor decreed a rescision of the contract as to the negroes; and that they be delivered to the complainants; that an account be taken, in which the complainants should be allowed for the value of improvements put upon the land, and for the hire of the negroes; and should be charged for the rent of the land, and the value of timber sold by them. The defendant appealed to this court.

The only question which is now made, is, whether the complainants are entitled to compensation for improvements. It appears from the bill, answer and proof in the cause, that the complainants went into possession of the land in good faith, under an agreement to purchase. The execution of the bill of sale, and delivery of the negroes to the defendant, in part payment for the land, furnish conclusive evidence, that the complainants intended, *bona fide*, to fulfil their agreement, and receive a title for the land. As to the subsequent misunderstanding of the parties, it is not necessary to enquire. The contract was void; not having been in writing. And the question is, whether a party, who has made improvements on the land of another, his possession having been *bona fide*, can come into a court of equity for improvements.

It is not controverted, but that if the owner of the land, were,

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in such case, to come into equity, seeking an account, the defendant would be permitted to deduct therefrom, the full amount of all meliorations and improvements which he has beneficially made upon the estate. This would be done upon the old and established principle, that he who seeks equity, must do equity. 2 Story's Eq. Jurisp. sec. 799.

But it is supposed, that Courts of Equity ought not to go further, and to grant active relief in favor of such *bona fide* possessor, by sustaining a bill for improvements, brought by him against the true owner, after he has recovered the premises at law.

This opinion, entertained by Chancellor Walworth (*Putnam vs. Richie*, 6 Paige's Rep. 390,) is controverted by Mr. Justice Story, in a very able opinion, delivered by him in the case of *Bright vs. Boyd*, decided in the Federal Circuit Court for the District of Maine, and reported in 1 Story's Rep. 478, 491-2-3.

In neither case is any other authority referred to. And it is stated, that no case in England or America can be found, where this point had been decided either way. Judge Story says: "It appears to me, speaking with deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate, by his meliorations and improvements, is contrary to the first principles of equity. To me it seems manifestly unjust and inequitable, thus to appropriate to one man, the property and money of another, who is in no default."

We concur in these views of the learned Judge, whose opinion has been quoted, and are, therefore, of opinion, that the complainants were entitled to such improvements as have enhanced the value of the land.

No question is here raised, as to the amount which was allowed, or of the correctness of the account in any particular.

Let the decree be affirmed.

## WYATT vs. RICHMOND.

Any legal defence, which arises after an issue in fact or in law is made up, may be pleaded as a matter of right, and it is within the discretion of the court to admit the plea after more than one continuance has intervened. This discretion must be regulated by circumstances extrinsic.

This is an action of debt, for rent, instituted in the Circuit Court of Davidson county, by Wyatt against Richmond, on the 4th day of December, 1840. The record shows, that the cause was continued at the January term, 1842, on the affidavit of plaintiff.

At the January term, 1843, the defendant moved the court for leave to file an additional plea. He tendered the plea. This plea avers, that after the commencement of the suit, to wit, on the 25th day of March, 1842, he filed his petition for his discharge from his debts and obligations, under the bankrupt law; and that on the 23d day of August, 1842, he obtained his discharge by a decree of the Federal District Court at Nashville, and in the list of debts, is the debt of plaintiff.

Judge Maney, the presiding Judge, rejected the plea, on the ground, amongst others, that defendant's certificate of discharge is dated prior to the sitting of the last term of the court, and that it ought to have been pleaded at the previous term of the court.

The case was then submitted to a jury, and a verdict and judgment rendered in favor of the plaintiff. The defendant appealed.

*Washington and Lea*, for the plaintiff in error. See 4 Hawks, 283; 1 Hay. 181; 9 John. 255; 4 Serg. & R. 239; 5 Dow. & Ry. 521.

*E. H. Ewing*, for the defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of debt, brought by Winnefred Richmond against Spencer Wyatt. Pending the suit, and after issue joined, defendant was declared a bankrupt, and obtained his

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certificate as such. This he neglected to plead at the first term of the court thereafter, but proposed to do so at the second, and tendered a plea in proper form, which was rejected by the court upon the ground, that it had not been offered before.

This involves a question of practice, upon which there is no precedent in this State, and it is very difficult to apply the rules of practice of the courts of other States to those of ours, particularly so those of Great Britain, whose courts are so differently constituted from ours. Chitty, at page 456 of his work on Pleadings, lays it down as a general principle, "that if any matter of fact has arisen after an issue in fact or joinder in demurrer, it may be pleaded by the defendant, as that the plaintiff hath given him a release;" and he also says, that it may be admissible so to plead the defendant's bankruptcy, when he has obtained his certificate after issue joined. He also says, at page 457: "with respect to the time when matters of this description are to be pleaded, it appears, that if the ground of defence arise after plea or after issue, and before the return of the *venire facias*, it should be pleaded in bank, and when the defendant after pleading obtained his certificate as a bankrupt, and then pleaded it in bank as a matter which had arisen after the last continuance, but in fact another continuance had intervened between the certificate and the plea, the court admitted him to plead *nunc pro tunc* on the payment of the cost." This then may be considered as the practice upon the subject while the case is yet in bank: whether a different rule would be made to apply after the case had been set for trial to the *nisi prius* court, he does not say; but we can see no reason why it should. But be this as it may, as we have no such distinctions in our courts, the case always being in bank, if we may so call our Circuit Courts, whatever would be a good principle of practice in bank in England, upon the subject under consideration, would be a good one here. This, then, may be considered as authority for the reception of the plea. In the case of *Morgan & Smith vs. Dyer*, 10th Johnson's Rep. 161, it is said, that it is in the discretion of the court to receive the plea or not, even after more than one continuance has intervened, and this discretion will be governed by circumstances extrinsic and which



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cannot appear on the face of the plea. This case clearly shows, if the discretion to receive the plea exist, that it is a legal and not a blind discretion, to be exercised and governed by circumstances extrinsic and which cannot appear on the face of the plea. In the case under consideration there are no such circumstances, and the plea appears to have been rejected, simply because it is a plea of bankruptcy, which certainly constituted no ground for its rejection, it being a substantial legal defence, given by law and guaranteed by law, and, therefore, entitled to as much favor as any other legal defence.

It is true this court has said repeatedly, that it interferes with reluctance upon questions of practice in the inferior courts, and upon questions involving the exercise of discretionary power; but where the discretion is legal and not arbitrary, and involves questions effecting the merits of the suit and not the mere mode of conducting it, that interference has and always must be interposed for the protection of the right.

Believing then as we do, that the plea in this case ought to have been received, we reverse the judgment, and remand the cause, with instructions that it be received.

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BLACK, *adm'r.* vs. PLANTERS' BANK *et als.*

1. A *f. fa.* issued after the death of defendant, on a judgment rendered previous thereto, relates to the test, and binds the goods of the defendant from that date.
2. The act of 1833, abolishing different grades of dignity in the debts against the estates of deceased persons, does not affect the lien of a *f. fa.* which attaches before the death of the defendant.

This was a bill filed in the Chancery Court at McMinville, by Black, administrator of Coffee, deceased, against the widow, distributees and creditors of the deceased, suggesting the insolvency of the estate, and praying for a settlement of the estate according to law.

The bill stated, that the Planters' Bank had recovered a judgment against Coffee in his life time, for \$5871, in the Circuit

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Court of Davidson county, on the 14th day of September, 1842. That Coffee died on the 3rd day of October, 1842. On the 24th day of October a *fi. fa.* was issued, and on the 29th was levied on the slaves and other personal property of the deceased. On the 7th day of November the County Court of Warren county, appointed Black administrator of the estate, and on the 19th day this bill was filed. It prayed an injunction against the *fi. fa.*, the sale of the property of the estate, and distribution of the proceeds *pro rata* amongst all the creditors of the deceased.

The Bank demurred to the bill. The demurrer was sustained by the presiding Chancellor, Ridley, and complainants appealed.

*Meigs*, for the complainants.

*Fogg and Taul*, for the defendants.

GREEN, J. delivered the opinion of the court.

There is no question, but that in England a *fi. fa.* issued after the death of a party, but tested before his death, would bind his goods. *Waghorne vs. Langmead*, 1 Bos. & Pull, 571.

In this State, the same doctrine has been held. In *Preston vs. Surgoine*, Peck's Rep. 80, a majority of the court, against the opinion of Judge White, decided, that a *fi. fa.* issued after the death, upon a judgment rendered previous thereto, would relate to the *teste* and bind the goods. This decision has been followed ever since. 1 Yerg. Rep. 291; 7 Yerg. Rep. 529; 9 Yerg. Rep. 442.

The question here is, whether the act of 1833, ch. 36, sec. 6, affects this case. That act (Car. & Nich. 395,) provides, "that no action brought, judgments, bills single, or notes of hand shall have precedence over unliquidated accounts," &c. "but that all such claims be acted upon as being of equal grade."

This act only intended to abolish the preference which existed at common law, and which the act of 1786, ch. 4, sec. 2 (Car. & Nich. 73,) defined and regulated; by which "debts due by bills, bonds, and promissory notes, and settled and liquidat-

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ed accounts signed by the debtors," were declared to be of equal dignity.

But the act of 1833 declares, that neither the debts specified in the act of 1786, nor judgments, nor actions brought, shall have precedence over unliquidated accounts. Thus all distinction, as to the mere dignity of debts, is done away; but the lien acquired by an execution is not affected.

Such a case is not within the letter of the act of 1833; execution not being mentioned in the act, nor is it within its spirit. These execution creditors, therefore, have a preference over other creditors.

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UNION BANK vs. THE UNITED STATES BANK *et als.*

1. A Corporation, foreign or Domestic, can sue or be sued under the attachment laws of the State of Tennessee.
2. The case of Hopkins, Hull and others against the Gallatin Turnpike Company, approved.

This bill was filed in the Chancery Court at Franklin. A decree was rendered in favor of the complainant by Chancellor Bramlitt, from which the defendants appealed.

*Washington*, for the complainant.

*Fogg*, for the defendant.

GREEN, J. delivered the opinion of the court.

This bill is filed by the Union Bank of Tennessee against the United States' Bank of Pennsylvania and John Somerville and Foster & Fogg, alleging that the Bank of the United States is indebted to the complainant in the sum of \$1336 93, and that the other defendants have in their hands effects of the said Bank, sufficient to discharge said debt, praying for an attachment, &c.

The bill was taken *pro confesso* against the Bank, and the other

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defendants answered, admitting they had in their hands, effects as charged; but stating, that they had received notice, that the effects of the Bank of the United States had been assigned to Trustees for the benefit of the creditors of the Bank.

1. As to the right of a Corporation, whether domestic or foreign, to sue or be sued, under the attachment laws of 1836, ch. 43, (C. & N. 106,) and 1837-8, ch. 166, (session acts, 134,) there can be no doubt. The act of 1837-8, provides, "that when any creditor shall have any demand against a debtor, and such debtor shall not reside within the State, but shall have property, debts, or other effects, within this State, or debts due him, from persons residing or being within this State, it shall be lawful," &c.

Here the words *creditor* and *debtor* are employed in their largest sense, and were evidently intended to include all persons, natural or corporate, capable of being debtors or creditors.

It is not necessary, therefore, to rely on the decision of the Supreme Court of the United States, referred to (5 Cranch, 86,) where it was held, that the individual character of the corporators might be looked to, and if they were citizens of a different State from that in which the suit was brought, the Federal Court would have jurisdiction.

But it is insisted, that the deed of assignment which has been made, of the effects of the Bank, is invalid, because,

1st. The agent who affixed the corporate seal, was not authorized to do so, by a power of attorney under seal.

2. It is not shown that there was a vote of the Board of Directors empowering the President to affix the seal to said deed.

3. The Corporation had no power to assign away all its effects, and thereby extinguish its existence.

These questions have all been discussed and decided at the present term, in the case of *Hopkins, Hull and als. vs. The Galatin Turnpike Company*. And we deem it unnecessary to repeat here, what was said in that case. See Angel & Ames on Cor. p. 114, 115, sec. 7.

In addition, however, to any reasoning of our own, or authorities from analogous cases, we refer to the case of *Dana vs. The Bank of the United States and James Dundas*, in which the

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very deed, the validity of which is brought in question in this case, was before the court, and was adjudged to be valid.

Let the decree be affirmed.

**WOOD, ABBOTT *et als.* vs. MORGAN, ALLISON *et als.***

1. A tender of money for the redemption of real estate, sold by decree in Chancery before the confirmation of the Master's sale, was premature, and did not authorize a decree. The creditor is allowed by law two years to redeem, commencing from the confirmation of the Chancery sale.
2. The case of *McGavock vs. Woods*, 10 Yerger, approved.

This bill was filed by Wood, Abbott and others in the Chancery Court at Murfreesborough, against Morgan, Allison and others, and was heard on bill, answers, replications and proof, at the June term, 1843, before Ridley, the presiding Chancellor. He dismissed the bill, and the complainants appealed.

*Ready*, for complainants.

*Washington*, for defendants.

GREEN, J. delivered the opinion of the court.

This bill is filed to redeem a lot in Murfreesborough, which the defendants, Morgan, Allison & Co., purchased at a sale made by virtue of two decrees in Chancery against the owner, Reuben Bolles. The complainants are judgment creditors of Bolles, and insist that, as such, they had a right to redeem the lot in question, under the act of 1820, ch. 11, and 1832, ch. 36, and that they offered to redeem the same within the time allowed by the law. It appears from the record, that the lot was sold by a Commissioner, appointed by the Chancery Court in April 1840, and was bid off at \$450, by Alexander Allison & Co. The Commissioner made his report to the court, and at the July term, 1840, the sale was confirmed and a title was made to Morgan, Allison & Co. After the sale, and before the

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same was reported and confirmed by the court, the complainants, by their agents, offered to pay the amount of the bid and ten per cent interest thereon, and to credit Bolles with ten per cent; but the defendant Allison, in behalf of his firm, refused to permit the redemption, unless the complainants would also pay a debt due them from Bolles, and for the security of which, a deed of trust for this lot had been executed to E. A. Keeble, Esq., in 1838, whilst the causes were pending, in which the decrees were pronounced, by virtue of which the sale in question was made. This the complainants refused to do; insisting that as the defendants were not judgment creditors, they had no right to demand the amount of their debt, in addition to the sum bid. The first question is, whether the offer by the complainants to redeem was not premature? In the case of *Henderson vs. Lowry*, 5 Yerg. R. 244, this court decided, that a party whose land was sold under a decree in chancery, was entitled to redeem within two years after the confirmation of the sale.

This court, in that case, decided with some hesitation, that a sale by virtue of a decree in Chancery was embraced within a proper construction of the act of 1820, that act using the words "may be sold under execution," and containing no language expressly including sales by virtue of decrees in Chancery. But no doubt was entertained, but that if sales of this description were embraced, the period of two years allowed, must commence and take date from the time of the confirmation of a sale by the court. Subsequently, in the case of *Lowry vs. McGee*, 8 Yerg. Rep., no question was made, but that the offer to redeem was in due time, although more than two years from the date of the biddings before the Master, but within two years from the date of the confirmation. But if there were no case upon the subject, we should have no hesitation in holding, that there is no sale until the offer, made to the Master, is sanctioned by the court and confirmed. The sale is under the control of the Court of Chancery until it is confirmed, and may be set aside altogether, or the biddings opened with a view to obtain a higher price, at the discretion of the Chancellor. How can that be a sale which is not obligatory upon the parties? It

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is a bid, an offer by the purchaser, and if the court is satisfied with it, it is obligatory upon the parties making it, and being confirmed by the court, vests in the purchaser a right to the property.

The act of 1820, allows the redemption to take place, "at any time within two years after the sale." The act of 1832, extends the provisions of the act of 1820, expressly to cases of sales under decrees in Chancery; and provides, "that lands sold by virtue of such decrees, shall be redeemable in the same time and manner, and by the same persons, and under the same rules and regulations as provided, authorized and directed by the provisions of the act of 1820, ch. 11.

The time then allowed for redemption by the act of 1832, is that mentioned in the act of 1820, "within two years after the sale." If, as we have seen, the two years commence from the date of the confirmation, that act of the court constituting the sale, it follows, by the words and the plain meaning of the statute, that no redemption can be allowed before such confirmation. For the period fixed is "within two years after the sale." Of course it cannot be allowed before the sale, as would be the case, if a party may redeem before a confirmation of the sale. And indeed, if confirmation were allowed before the Chancery Court confirms its sales, we should have purchasers and creditors involved in endless confusion; so that it would be impossible to carry out the intention of the legislature.

The Supreme Court sits but once a year. A sale may take place soon after the adjournment of the court, leaving some eight or ten months before the sale can be acted upon by the court. In the meantime the estate has been redeemed several times, each person redeeming, paying up the bid and ten per cent, and perhaps a *bona fide* debt of the purchaser in addition. But when the court comes to act upon the report of the Master, the sale is set aside, and held for nothing. How are all these parties to adjust their several claims upon each other? Certainly great confusion and much litigation would be the result of such a practice. It appears to us, in view of these difficulties, and we put this case upon this ground, that no redemption

[Gooch & Farriss vs. Massey.]

can be allowed under sales made by virtue of decrees in Chancery, until the same shall be confirmed by the court.

It is unnecessary to discuss the other ground relied on by the defendant. As to the necessity for the purchaser to have a judgment, before he can demand the payment of any debt due him by the party whose land was sold, as a condition which another creditor must perform, before he can redeem, we refer to that part of the opinion delivered by Judge Reese, in the case of *McGavock vs. Woods*, 10 Yerg. Rep., as containing the exposition of the act of 1820, with which we are, now, upon a review of the case, perfectly satisfied. As to whether the deed of trust, for the benefit of the defendants, upon this property, can be looked to, behind the sale under which they claim, as it is, so as to aid their title under the sale and give to their debt a dignity it would not have possessed but for the deed, it is unnecessary to express an opinion. Let it suffice, that the offer to redeem, made by the complainants, was premature, having been made at a time, when, by law, no right of redemption existed, and, therefore, their bill must be dismissed.

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GOOCH & FARRISS vs. MASSEY.

1. A note was made for sale, and purchased in at a greater rate of discount than six per centum, with a knowledge of the purpose for which it was made: Held, that the transaction was usurious, and that the note was subject to a deduction of the excess in the hands of the purchaser or his assignee.
2. Whether a note has been put in circulation in due course of trade, is a mixed question of law and fact, and should be submitted to the jury under a proper charge of the court.

This is an action of assumpsit, instituted in the Circuit Court of Rutherford county, by Massey, an assignee of a note against Gooch & Farriss, who were accommodation endorsers. It was tried at the July term, 1843, by Judge Maney, and a jury of Rutherford county, on the pleas of non-assumpsit and usury, and a verdict and judgment were rendered in favor of the plaintiff, from which the defendants appealed.



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*Ready*, for the plaintiffs in error. See 10 Yerg. 429, 417; 1 Hump. 468; 2 Yerg. 463.

*Keeble*, for the defendant in error.

GREEN, J. delivered the opinion of the court.

The facts of this case are these; Josiah Farriss, Sr., made his note for \$500 to Walter Keeble, which was endorsed for accommodation by him, and by the defendants, Gooch and J. C. Farriss. The note was made to be discounted at the Bank of Tennessee, for the benefit of Josiah Farriss, Jr., who was indebted to J. T. Elliston for house rent, and to pay which debt he wished to raise the money. The Bank did not discount the note, and it was returned to Josiah Farriss, Jr., who placed it in Mr. Elliston's hands as a collateral security for the sum due him. When the note fell due Elliston placed it in the Bank for collection, and it was protested for non-payment, and notice was given to the endorsers. While the note was thus under the control of Elliston, Josiah Farriss, Jr., procured Massey to purchase the note, which he did for the sum of \$432 50, and Elliston gave up the note and received the money which Massey had given Farriss in discharge of so much of the debt Farriss owed him. Massey then brought this suit against Gooch and J. C. Farriss, the endorsers. They pleaded two pleas, "non-assumpsit," and that the contract was "usurious" to the amount of \$67 50.

The court charged the jury, "that if the note was endorsed for the accommodation of the maker, and was given by him to Josiah Farriss, Jr., and by him handed over to a creditor, either in payment or as a pledge, it was put in due course of trade, and although it should afterwards be sold at a greater rate of discount than six per cent. per annum, the defendants would be responsible for the whole, subject to such payments as may have been made."

We think the court erred in assuming, that this note was put in circulation when placed in Elliston's hands, and was by him sold to the plaintiff. The evidence did not warrant such an as-

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sumption, and he should have left it to the jury, upon a proper charge, to determine whether Massey purchased the note from Farriss or Elliston. If he purchased from Farriss, Elliston returning the note to enable him to sell it, the contract would clearly be usurious, because Massey knew it was made and endorsed for the accommodation of Farriss to raise money upon it, and the purchase of it, was only in fact a loan of money at a greater rate of interest than the law allows.

But whether Massey purchased the note from Farriss or Elliston can make no difference in this case. Beyond question Farriss only received \$432 50 for the note. Now, if Massey did not purchase the note from Farriss at this usurious rate of discount, it is clear that Elliston did; and if Elliston gave Farriss the \$432 50 for the note of \$500, and then sold it to Massey for a like sum, the subsequent sale to Massey would not purge it of the taint of usury it contracted in the first negotiation, and the parties can make as effectual a defence against the assignee of the usurer, as they could against the usurer himself. It is plain, therefore, that Massey either purchased the note of Farriss, and was guilty of usury, or he purchased it from Elliston, who had obtained it from Farriss upon a usurious contract, and in either event, the defendants are entitled to their defence.

What is due "course of trade" has been defined by this court in several cases, and need not be repeated here, as no question of that sort is necessarily involved in the case. See 10 Yerg. Rep. 417, 429; 1 Hump. R. 468.

The judgment must be reversed, and the cause remanded for another trial.

## FARIS vs. GREEN.

1. The act of 1801, ch. 18, sec. 3, discharging "assignors" of certain instruments, when the creditor fails to sue within thirty days after notice given to sue, embraces endorsers of negotiable paper.
2. Where a note was endorsed in blank, and deposited in Bank for collection, the legal interest was transferred to the Bank, and notice given by the endorser to the Bank to sue, was a valid notice, and in accordance with the 3d section of the act of 1801, ch. 18.

Faris sued Green administrator of Green, and Dyer, in the Circuit Court of Franklin county, on an endorsement of a promissory note by the intestate, and at the March term, 1843, a judgment was rendered on demurrer in favor of the defendants. The plaintiff appealed.

*Taul and Venable*, for the plaintiff.

*James Campbell*, for the defendants.

JOHN J. WHITE, special Judge, delivered the opinion of the court.

This is an action upon the case, brought by Sanders Faris against Edmund Dyer, and James F. Green administrator of Thomas Green, deceased, upon a note for \$110, executed by Edmund Dyer to Thomas Green, dated the 11th July, 1840, and payable four months after date, at the Branch of the Planters' Bank of Tennessee, at Winchester. The declaration is in the common form against the maker and endorser of a promissory note.

The defendant, Green, pleads, that at the time the note became due and payable, the same was held by the Planters' Bank of Tennessee, to whom it had been regularly assigned and delivered at the Branch of the Bank at Winchester; that the defendant being an accommodation endorser on the note, did on the 5th of November, 1840, and after the note became due and payable, give notice in writing to the Bank, to put the note in suit forthwith, but that neither the Bank, or Brazleton, or Faris, did put the said note in suit against the said Edmund

[*Faris vs. Green.*]

Dyer, as required, within thirty days after the notice was given.

To this the plaintiff replies, that the note was not at the time notice was given to the Bank regularly assigned and delivered to the Bank, as the owner thereof, but was merely endorsed in blank, and deposited in the Bank for collection.

To this replication there is a demurrer, which was sustained by the court below, and judgment given for the defendants, from which the plaintiff prosecuted an appeal in error to this court.

This case involves the construction of the act of 1801, ch. 18, sec. 3, (N. & C. 652,) which is in these words: "It shall be lawful for the assignor or assignors of such bonds, covenants, bills and notes as aforesaid, his, her, or their executors or administrators, whenever he or they may apprehend that the original drawer or drawers of such instruments of writing as aforesaid, are likely to become insolvent, or migrate and leave the State, to require, by notice in writing as aforesaid, the assignee or assignees, his her, or their executors or administrators, forthwith to put such bond, covenant, bill or note as aforesaid, in suit against the drawer or drawers, provided the same shall be due and payable, and unless the assignee or assignees, his, her, or their executors or administrators, so required to put such bond, covenant, bill or note, in suit, shall, within thirty days after such notice aforesaid, commence an action thereon, and proceed as securities are directed in the first section of this act, against their principal, the assignee or assignees of such instrument of writing as aforesaid, shall thereby forfeit the right, which he or they would otherwise have to demand or receive of such assignor or assignors the amount which may be due by such bond, covenant, bill, or note."

It is contended for the plaintiff in error, that the language here used, is not broad enough to embrace the case of an endorsement of negotiable paper. We think differently. It is true, the term "assignor" is used instead of "endorser," but evidently as of the same import, meaning the party liable in consequence of his name being upon the back of the instrument. Besides, this is warranted by high authority. Chitty in reference to a bill of exchange, speaks of its assignable quality.

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And, again, that it may be assigned so as to vest the legal, as well as equitable interest therein, in the endorsee or assignee, and to entitle him to sue thereon in his own name. Chitty on Bills, 6, 7. Green the first endorser, who is primarily liable, and who wishes to protect himself and his intestate's estate, gives the notice.

The next enquiry, then, is, to whom is notice to be given? It is to the assignee of such bonds, covenants, bills, or notes, his, her, or their executors or administrators. And the question now is, who, in the law, was the assignee of this note at the time the notice was given by Green. The replication admits, that the Bank at that time was the holder of the note; that it had been endorsed in blank; but at the same time alleges, that it had not been regularly assigned and delivered to the Bank as the owner thereof, but deposited there for collection.

Do not these facts constitute the Bank the assignee, and throw upon it the responsibilities of that relation, whether it was beneficially interested in the note or not? In Chitty on Bills, 155, (9th American Edition,) it is said, that an endorsement in blank, "is sufficient to transfer the right of action, to any *bona fide* holder." And, again: "it is settled, that such an endorsement, in itself, constitutes a complete and perfect transfer of the interest in the bill, and without the addition of any other words, will vest the right of action, and all other rights in the transferee and the subsequent holders."

When a negotiable note is endorsed in blank, the holder may fill it up with any name he pleases, and the person whose name is inserted, will be deemed rightfully entitled to sue. *Tyler vs. Binney*, 7 Mass. Rep. 479; *Lovell vs. Everton*, 11 John. 52; Chitty, 267, note 1. The holder of a negotiable note, by blank endorsement, may maintain a suit, on it, without filling up the same to himself. Chitty, same page and note. It is considered, therefore, that the Bank was, in the law, the assignee of the note at the time notice was given by Green.

Suppose the note had been met at maturity, or if not, had been subsequently paid to the Bank, while it has the note in its possession, no one would question the legal right of the Bank to receive the money, although it might afterwards be required

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to pay it to the individual from whom it had received the note. And if the Bank would have the right to receive the money, subsequently to its falling due, no good reason can be perceived why other responsibilities should not be attached to it, which grow out of the relation of being holder of the paper.

It would operate as a fraud upon the endorser to be told, after he had given notice to the party, who was the holder and assignee of the note, to sue, that the same was merely deposited with him, and endorsed to him for collection, but that in point of fact, he had no interest in it, and, therefore, that the notice could not properly be given to him, but should be given to some other individual who was entitled to the money, living perhaps in Philadelphia or New York, whom that endorser had never seen, and of whom he knew nothing. A satisfactory reply to him would be, that that is a matter between yourselves, with which I have nothing to do. You are entitled to receive the money, for what purpose it is not my business to enquire. You admit the note was deposited with you for collection; the law, therefore, throws upon you the necessity of using those means which are necessary to collect the money from the principal; and if by any arrangement between you and your immediate assignor, he upon a given event, the money not being paid, is to take it up, and again become the holder of the paper, you can give information, so that he may proceed against the maker according to the requisition of the notice; and if you do not give him this information, or he does not choose to act upon it when received, the consequences are upon your own heads, and you must suffer for your laches.

It is contended, that the Bank had no authority to sue upon the note, it being merely an agent for a specific purpose. From what has been before said, this position is regarded as untenable. But even if sound, it will not affect the argument. The important requisition of the statute is, that upon notice being given, the note shall be put in suit, within thirty days against the drawer, whether in the name of the Bank, or the party entitled to the money, is not material. It is no hardship to the Bank, for if the Bank does not choose to sue, it can inform its principal, and if the principal fail to sue within the time speci-

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fied, the assignor who has given the notice is, and ought to be discharged. Again, if the Bank should be regarded merely as the agent of the assignee, still being in possession of the note by authority of its principal, and for the purpose of collection, when the notice was given, it is believed, that notice to the agent in such a case would be notice to the principal, and he would be bound by it.

Let the judgment be affirmed.

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McLARIN vs. THE STATE.

When the witness of plaintiff in an action of slander, under the plea of justification, stated in reply to interrogatories put to him by the plaintiff respecting the plaintiff's character, that some persons spoke well of him, and some spoke ill of him; and being asked by plaintiff who spoke ill of him, said, J. M. charged him with a specific offence: Held, that it became, *under the circumstances*, material whether J. M. did make the charge or not, and plaintiff had the right to prove by J. M. that he did not make it.

McLarin was indicted in the Circuit Court of Lawrence county, for perjury; and on the plea of not guilty, the case was submitted to a jury at the October term, 1841; Dunlap, Judge, presiding. The defendant was convicted, and sentenced to three years imprisonment in the Penitentiary. From this judgment he prosecuted an appeal.

*Haynes and Goode*, for the plaintiff in error.

*Attorney General*, for the State.

RESE, J. delivered the opinion of the court.

This is an indictment for perjury, alleged to have been committed by the plaintiff in error, in a suit in which Geo. McLarin was plaintiff, and one McIntyre was defendant. It was an action for slander, to recover damages for the speaking of words by McIntyre, imputing the crime of hog-stealing to George McLarin. The issues were taken upon the pleas of not guilty

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and justification. And on the trial the plaintiff, to sustain his general character, called one Milton, who stated, that some spoke well of plaintiff, and some spoke ill of him. And being enquired of by the plaintiff, as to who spoke ill of him, he said James M. McLarin or Reuben McLarin, brothers of plaintiff, he did not recollect which; his impression was James M. McLarin had told him, some seven years before, that his brother George kept two half bushels of unequal size, the small one at his thrasher, and the other one elsewhere to take toll by. Plaintiff then called James M. McLarin, who said, he did not recollect having made the statement set forth by Milton, to him; and being called back, he said he had not made it to Milton, or to any one else. Upon this the perjury is assigned. The testimony was not *prima facie*, and with reference to the issues at large between the parties, material; it became so in the progress of the trial, and in the order and deraingment of proof, which the plaintiff, and the plaintiff only, had a right to adopt. The defendant in that action would have had no right to have proved particular instances of misconduct, other than the defamatory words involved, as having occurred in fact, or as having been imputed. But the plaintiff, himself, on the ground of the plea of justification, had a right to prove a general good character; and when his witness, Milton, said, some spoke ill of him, he had a right, perhaps, to enquire, particularly as it was not objected to, who those persons were, and what they said. And when Milton gave the statement above named, he had a right, not indeed to attack the general credit of Milton, but to show, that he was mistaken, and had not recollected the matter correctly. In this progressive mode only, and on the side of the plaintiff, did the testimony in question spring up into any thing, bearing the impress of materiality. But its materiality, incidental at most, is limited by the nature of the case, and the order of events, to the single enquiry, whether James M. McLarin made to Milton the statement in question; not whether that statement was true; not whether he had or had not made it to others. Milton in the first instance said, he did not remember whether the statement was made by Reuben or James M. McLarin; his impression was, James. James M.



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McLarin said, he did not recollect having made the statement to Milton. Afterwards, according to some, he said, he did not make it to him, or to others. Out of this difference of recollection as to a collateral matter has arisen this prosecution. On the trial of the indictment, Milton says, he is now satisfied that it was James M. McLarin who made the statement in question. There is no other proof to the point. The other witness, who said he heard James M. McLarin tell Milton, seven or eight years ago, that he, like his brother George, must not keep two half bushels, one at his thrasher, and the other at his mill, does not speak of the half bushels being of unequal size, and therefore his testimony is in favor of the defendant.

There was, then, before the jury a defect of proof on that point: this being an indictment for perjury. Moreover, there is no testimony in the record, that James M. McLarin was sworn on the trial of the case between George McLarin and McIntyre; and the bill of exceptions sets forth expressly, that all the testimony heard is exhibited.

Upon the grounds herein stated, we reverse the judgment, and award a new trial.

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#### LESTER'S Case.

1. The levy of a *f. fa.* on personal property vests in the Sheriff the legal right to the property for the use of the plaintiff, and the Sheriff, after the return of the *f. fa.*, may sell, and the sale will be valid.
2. The lien of a *f. fa.* continues after the return of *f. fa.*, and is not discharged by the taking of a delivery bond, but is discharged by the forfeiture thereof. *Abbott vs. Malone*, 3 Hamp.
3. The forfeiture of a delivery bond, taken without authority of law, does not discharge the lien of the *f. fa.*

This is a motion which was made in the Circuit Court of Wilson county, Dillahunty, Judge, presiding, by Lester, Sheriff, for instructions in reference to the distribution of certain funds in his hands, collected by virtue of an execution. The facts are detailed in the opinion of the court.

[Lester's Case.]

*Lindsley, Caruthers and Stokes*, for the applicant.

REESE, J. delivered the opinion of the court.

On the 18th January, 1843, there came to the hands of the Sheriff of Wilson county, an execution against the Cummings, at the suit of Richmond, Fisher & Co., for \$757 04, tested of September term, 1842, returnable, and returned on the, then, current January, to wit, 24th day, with the endorsement thereon, of a levy upon certain slaves and store goods, which there was not time to sell.

At the time of the levy a delivery bond was taken by the Sheriff, conditioned, for the delivery of the property levied on, on 1st Monday of March. This bond is not shown in the record. This delivery bond was not forfeited; for the plaintiffs directed the Sheriff, in writing, that he might take another delivery bond for the property on 1st of April, but must continue the lien of the levy. On the 9th of March, the Sheriff endorsed on the old execution, that he had *re-levied* on the same property. The bond then given, was executed by persons not defendants in the execution, for the surrender of the property to the Sheriff on 3d of April, 1843. The property was not surrendered, and the bond forfeited. On the 10th of May, the Sheriff professed to re-levy the same execution on the same property; and he sold it to satisfy the same, on 22d May, 1843.

In the mean time, there came to the hands of the Sheriff the other executions in the record mentioned, tested of January term, 1843. And the question is, whether the property was so treated under the first execution, as to discharge its prior lien, and subject its proceeds to the satisfaction of the junior executions. Some absurd things took place on the part of the Sheriff; as for instance, his *re-levies* in March and May, by virtue of an execution, which was returnable in January preceding. But, while that could avail nothing, on the other hand, it would not disturb the attitude in which, by operation of law, the property had been placed.

On the 18th January, 1843, the property was levied on and the execution returned. This vested the legal title in the

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Sheriff, for the use of the plaintiffs; it was in *custodia legis*, and the Sheriff, without further process or levy, might have sold, and ought to have sold the property levied on. The levy and the writ, although returned, would sustain the subsequent sale. This is a well known, and long settled principle, not shaken, so far as relates to personalty, but established by the case of *Overton vs. Perkins*.

The bond taken at the time of the levy, did not release the lien of the levy. This is so settled in the case of *Abbott vs. Malone*, 3 Hump. Rep. It is the forfeiture of such bond, which, according to that case, merges the lien of the levy in the bond which becomes on forfeiture a *quasi* judgment. But this bond was not forfeited, and the property came again into the possession and under the control of the Sheriff, and subject to the continuing lien of the levy. Nothing intervened between this time and the sale, to discharge this lien. For as to the second bond, founded upon the supposed second levy of the execution long returned, as such re-levy was useless and ineffectual, the bond taken upon it was without statutory authority. And, again, this bond was given by strangers to the execution. The property was in their hands, as the bailees of the officer. The lien of the levy of the 18th day of January, 1843, continued during the time the bond stipulated, and after its supposed forfeiture; and the sale which took place finally had relation to, and was rendered valid by the means of the levy of the 18th January, 1843, and the lien arising therefrom; the subsequent proceedings happening to be of such a character as not to interrupt its continuity.

For the above reasons, we reverse the judgment of the Circuit Court in this case, and assert the prior lien of the execution levied on 18th January, 1843, and tested of September term, 1842.

**BOYD vs. BAYLESS et als.**

The creditor of a non-resident may attach a fund in his own hands, or a sum of money due from him to such non-resident, where the note is in the hands of the non-resident's agent, or a fraudulent transferee within the jurisdiction of the court, and may subject the same to the satisfaction of his debt.

This bill was filed in the Chancery Court at Clarksville, and a decree rendered in favor of the defendant on a demurrer to the bill, from which the complainant appealed.

*Boyd*, for the complainant.

*Kimble*, for the defendants.

**REESE, J.** delivered the opinion of the court.

The bill states, that William Kay, John Kerchival and Elbert Bayless, as partners, were indebted to complainant, by note; that he sued and obtained judgment against Kay and Kerchival, and issued an execution against them, upon which was a return of *nulla bona*; and that they are utterly insolvent. Elbert Bayless was not sued, because not in the State; that he has gone to Arkansas or Texas, with a purpose to remain, and is a non-resident. Elbert Bayless held a note on complainant and Killigrew for four hundred dollars; and to avoid the claims of creditors, he transferred, by assignment, the note to his brother, Thomas Bayless, without consideration, and for the benefit of the assignor. Suit has been brought upon the note, and judgment obtained against complainant and Killigrew, and all the money paid to Elbert Bayless, except an amount equal to the claim of complainant against said Elbert. This attachment bill is filed under the act of 1835-6, for the purpose of getting a decree against Elbert Bayless for the amount of complainant's debt against him, and for the satisfaction out of the funds belonging to him in the hands of complainant and Killigrew, not yet paid upon the judgment recovered against them in the name of Thomas, but for the use and benefit of Elbert Bayless, and to this end an injunction is prayed, and an attachment. The affidavit states, that Elbert Bayless is justly

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indebted to the complainant as stated in the bill; and that the other matters and things in said bill stated as of complainant's own knowledge are true, and those stated as derived from the information of others, he believes to be true. The bill was demurred to; and his honor the Chancellor thought proper to allow the demurrer, to dissolve the injunction, and to give judgment, under the act of 1817, against the complainant and his sureties in the injunction bond. The complainant has appealed to this court.

The case has been argued here upon the part of the defendants, as if the question involved, related exclusively to the power and course of a Court of Chancery to decree a set-off, where the complainant's demand is against a partnership firm, and one of the firm has a demand against him. But we suppose the single question in the case is, whether a complainant, to whom a non-resident is indebted, can, by virtue of the provisions of the act of 1835-6, obtain a decree against his non-resident debtor, where the fund to be attached is in the hands of the complainant himself, or the debt or chose in action belonging to the non-resident is due from the complainant. For, if in such case, relief will be granted, the process of injunction and the decree enjoining, are but means to render the relief effective. And we think, under such circumstances as are disclosed in this case, relief will be granted by virtue of the provisions of the act of 1835-6. If the non-resident, indeed, had with him the chose in action or note, nothing could be done. But where that is here, deposited in the hands of an agent, or transferred to his mere trustee for his benefit, the attachment will lie, and the fact that the complainant owes the money, any more than a third person, will not have the effect to obstruct the remedy given by the statute. If the note in question had been given by Killigrew alone to Elbert Bayless, and by him had been assigned as stated in the bill to Thomas Bayless, it would not be doubted, by any one, for a single moment, that this bill might have been filed by virtue of the provisions of the act of 1835-6. But the fact, that it was given by Killigrew and complainant can make no difference in the view of a Court of Chancery; it, to be sure, in order to make the remedy effectual, un-

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der the circumstances of this case, requires that the court should enjoin the judgment of Thomas Bayless assignee against complainant and Killigrew. When the rights of the parties are determined, that becomes the appropriate mode of relief in this particular case.

The affidavit of the complainant upon which the attachment issued, is a substantial compliance with the requirements of the act in question.

The judgment must be reversed; the demurrer disallowed; the case be remanded to the Chancery Court, and the defendants be directed to answer.

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#### UNION BANK vs. PHILIPS.

When the makers of paper, endorsed for their accommodation, and put by them into circulation, are sued, they are estopped from disputing the endorsement, and it need not be proved.

This action was tried on the plea of *non est factum*, before Judge Dillahunt, and a jury of Maury county, and resulted in a verdict and judgment for the defendant, from which the plaintiff appealed.

*S. D. Frierson*, for plaintiff.

*Nicholson*, for defendant.

TURLEY, J. delivered the opinion of the court.

This is an action of assumpsit, brought against the defendant as a joint drawer of a promissory note, made in the name of Dale & Philips: defendant pleads *non est factum*. Upon the trial it appeared that Dale & Philips were partners in merchandize, trading as such, and as such became indebted to the Union Bank in a sum, for which they executed their note with G. Frierson & Co. as endorsers; that this note falling due, another was drawn by E. W. Dale in the name of the firm, to be sub-

[*Union Bank vs. Phillips.*]

stituted in the place of the first, upon discount by the Bank, which also purported to be endorsed by the firm of G. Frierson & Co., which note was discounted by the Bank and the proceeds thereof applied to the payment of the first; but it also appears, that the endorsement of the name of the firm of G. Frierson & Co. was made by the one, or the other member of the firm, without the knowledge or consent of the one who signed it not.

Upon this statement of facts, the Circuit Judge charged the jury, "that the endorser of a bill or note transferable by endorsement, must in an action against the acceptor, or drawer, prove that the bill was endorsed by the person to whose order it was intended to be made payable; that if the jury should believe, that the endorsement of G. Frierson & Co., on the note sued on, was an accommodation endorsement, known to be so by the plaintiff at the time it took the note, and the jury should also believe, that if G. Frierson made the endorsement without the knowledge of his co-partner, Hughes, it would not be binding upon him, unless he assented thereto; and not being binding upon him, the legal title to the note would not be passed thereby to the plaintiff, and so it would likewise be, if it were made by Hughes, without the knowledge of his co-partner, Frierson, unless he assented thereto."

Upon this charge the jury found a verdict for the defendant, and could not have well done otherwise upon the proof. But was the charge correct? We think most assuredly not, both upon principle and authority. The proof shows most conclusively, that the paper was not *real*, but *accommodation*, put into circulation by the makers, and not by the endorsers. What is the consequence of this upon principle? It has been repeatedly held, not only by this court, but others, that where the paper is real, in a suit against a maker, or drawer, or acceptor by an endorsee, upon proper pleading, the endorsement must be proven, and why? Because, in the first instance, they pay at their peril: and in the second, because the endorser has an interest in the paper, puts it in circulation, and shall not be deprived of his right, in a proceeding to which he is no party, without proof satisfactory to the court and jury, that he has parted from

[Union Bank vs. Philips.]

it. But is it possible, that these principles can be made to apply in the case of accommodation paper? Surely not. They are alike in nothing but form. The endorser gives credit to the paper, but does not put it into circulation; he has no interest in it, except that the maker shall pay it at maturity. The maker is the issuer, the one who receives the money, and when he is sued, how shall it be held, that he may discharge himself, for want of proof, of the endorsement; the reason for requiring it fails entirely: "*causa cessante, cessat ipsa lex.*" Therefore it has been held, that if bills or notes be drawn to fictitious persons, and the endorsement filled up by the drawer, the endorsement need not be proven: therefore, it has been held, if a bill or note be drawn to a person *in esse*, and his name be forged as endorser, by the drawer, the drawer shall be held liable. And this as has been observed, because there are no persons who have any interest in the transaction, but those who put the paper into circulation, and those who purchase it; and that it would be a fraud on the part of the maker to use such a defence.

For an able view of this subject, conforming in every thing, with what we have said, see the case of *Meacher vs. Fort*, 3 Hill's So. Car. Rep. 227. Well, now apply these principles to the case under consideration. Dale & Philips owe the Union Bank by note; the note is due; Dale & Philips execute a new note to G. Frierson & Co.; one of that company endorses the note without the knowledge of the other, and the Union Bank, with knowledge of the fact, takes it upon discount, and delivers up their previous note. What is the consequence? Under the decisions upon partnership liability, the Union Bank has lost its security. But what has Dale & Philips lost? What has G. Frierson & Co. lost? Nothing. G. Frierson & Co. are discharged from liability as endorsers; they never had any interest in the note. Dale & Philips have lost nothing by the discharge of G. Frierson & Co.; their note is outstanding; it has been received in payment of a previous obligation, which is a good consideration; and to permit them to shield themselves from its payment, upon a principle of law, made to protect partners from mutual abuses of trust, a principle having nothing to do



[*Alexander vs Perry.*]

with their own case, as at present exhibited, would be monstrous indeed.

As we have said, it is at war with both principle and authority. The makers are estopped to say, that was not genuine, which they had represented to be so, by putting it in circulation.

The judgment must, therefore, be reversed, and the case remanded for a new trial.

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**ALEXANDER vs. PERRY.**

The widow and heirs of Alexander sold a tract of land belonging to deceased in his lifetime to Perry, and gave him a bond to convey title on payment of the purchase money. The notes were taken payable to the widow; and this bill was filed by her alone, to enforce the payment of the purchase money: Held, that the heirs were necessary parties, and that a sale of the land under a decree, would not convey the title to the purchaser.

*Laughlin*, for the complainant.

*S. Turney*, for the defendant.

GREEN, J. delivered the opinion of the court.

Martha Alexander, the widow of William Alexander, deceased, and her children, Silas, Samuel, James H. and Calvin H. Alexander, and her son-in-law Henry Powell, sold to the defendants the land of which their ancestor, W. Alexander, died seized and possessed of, and executed a title bond, dated 1st June, 1839, conditioned, to convey the said land to the defendants by the 25th December, 1840.

In consideration of said purchase, the defendants paid \$1000, and executed their note to Martha Alexander, due 25th December, 1840, for \$1000. This note has not been paid, and Martha Alexander, alone, filed her bill against the Perrys, to enforce the contract, and to obtain a decree for the sale of the land. Such decree was made, and the land was sold by the Clerk and Master, and purchased by Samuel Alexander for forty dol-

[Robinson adm'r. vs. Robinson.]

lars. This sale was confirmed by the Chancellor, and the interest of the defendants was by a final decree vested in the purchaser. From this decree the defendants appealed.

This decree is erroneous, and must be reversed. The legal title is in the heirs of William Alexander, and they are not parties to this suit. The consequence was, that the purchaser of the land could not be substituted to the equitable rights of the defendants, and must pay up the balance of the purchase money, and file a bill against those heirs before he can get the legal title. Hence the interest of the defendants was sacrificed for forty dollars.

The case must be reversed; the sale by the Clerk and Master set aside, and proper parties brought before the court.

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ROBINSON *adm'r.* vs. ROBINSON.

Where a father placed a son in possession of a tract of land, with the intention that he should have the use of it as a gift, such a state of circumstances excludes the idea of a contract for the payment of rent; yet where the father, under such a state of things, died intestate, the use and occupation of the land should be charged against the son in the distribution of the estate as an advancement.

This bill was filed in the Chancery Court at Shelbyville, by Joseph Robinson, administrator of John Robinson, deceased, against David Robinson and others, the distributees of said John Robinson.

John Robinson gave specific articles of property and sums of money to his children, at various times, and placed his son David Robinson in possession of a tract of land, containing some fifty acres of cleared land on it, about ten years before his death, intending to let him have the use of it, but retaining the title in himself. This was done to prevent it being sacrificed to pay debts which he might create.

John Robinson died intestate, without having made any title to his son David. After the death of the intestate, David kept possession, and this bill was filed to ascertain the extent of the advancements, and to distribute the surplus amongst those entitled.

[Robinson adm'r. vs. Robinson.]

The presiding Chancellor, Ridley, heard the case on bill, answer, replication and proof, and charged D. Robinson with the value of the premises during the entire period he had possession, as an advancement to him by deceased.

D. Robinson alone of the defendants appealed.

*Frierson*, for the complainant.

*Wisener*, for the defendant.

GREEN, J. delivered the opinion of the court.

This is a bill brought by Joseph Robinson, administrator of John Robinson, deceased, against all the distributees of the estate, for the purpose of ascertaining the advancements to them by the intestate; so as that the administrator may distribute the surplus of the estate among them according to law.

The case has come up here, on one item charged as an advancement to David Robinson. His father placed him in possession of a tract of land, having about forty acres cleared upon it. It was intended for his use, and that of his children; the title was not given to him, because the father was afraid he would waste the property. If this were a direct claim for rent by the administrator, it could not be maintained, because, if a father or other person put a relative into possession of land, intending either the land or its use, as a gift, or benefit, or loan or advancement to the party so let into possession, such circumstance will repel the idea of a contract express or implied for the payment of rent. *Ridley vs. McNairy*, 2 Hump. R. But this is not a claim by the administrator against David Robinson on the ground of indebtedness to him, or to the intestate for rent. It is a proceeding in which it is insisted, that the rent was in fact a loan or benefit given by the intestate, and to be considered of in that light in an equitable adjustment of advancements among the distributees. But so much of the charge for rent, as arises from the possession of the land, after the death of the intestate, is clearly wrong, and was erroneously allowed.

[Union Bank vs. Campbell.]

Upon that event taking place, the possessor, David Robinson, would become liable to the new owners, the heirs, for use and occupation.

Let the Clerk and Master enquire how much was so erroneously allowed, and to that extent the decree will be reformed.

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UNION BANK vs. CAMPBELL.

1. Fraudulent representations, or fraudulent concealment of material facts by an agent, when engaged in the transaction of the business of the principal will charge the principal.
2. And, therefore, where notice of the dissolution of a firm is communicated to a bank director for the purpose of being communicated to the board of directors, or where he is called upon to act as director in a transaction affecting the interests of the members of the dissolved firm, he is bound to communicate that knowledge to the bank, and if he do not, the bank is by law charged with notice of the facts so withheld.

This action of assumpsit against Campbell, as endorser, was instituted in the Circuit Court of Williamson county, and on the plea of non-assumpsit, and special pleas of *non est factum*, it was submitted to a jury, Maney, Judge, presiding, at the July term, 1843, and a verdict and judgment rendered in favor of the defendant. The plaintiff appealed.

*Alexander*, for the plaintiff.

*D. Campbell*, for the defendant.

GREEN, J. delivered the opinion of the court.

The defendant is sued in this case as a member of the firm of Henry Baldwin, Jr., & Co., on a note for \$540 54, executed to them by S. & L. T. King, dated 5th April, 1838, payable at the Union Bank in four months, and endorsed by Henry Baldwin, Jr., & Co., and by B. S. Tappan & Co., and which was discounted at the Union Bank for the benefit of B. S. Tappan & Co. the 13th of April, 1838.

The partnership of Henry Baldwin, Jr., & Co. was dissolv-

[*Union Bank vs. Campbell.*]

ed on the 1st of January, 1838, more than three months before the note in question was endorsed; notice of which dissolution had been published in a newspaper; and the endorsement was made by Henry Baldwin, Jr., of the name of his late firm, without the knowledge of the defendant. The firm of Henry Baldwin, Jr., & Co. had been previous dealers with the Union Bank. B. S. Tappan and E. D. Hicks, two of the directors of the Bank, had knowledge of the dissolution of the partnership before the note was discounted; and they were both present as members of the board the day it was discounted. Hicks remained in the director's room, and acted as a member of the board when the note was discounted, but Tappan (for whose benefit it was offered, and whose name was on it as endorser,) retired into an adjoining room when this note was offered for discount.

The court charged the jury in substance: "that Tappan and Hicks were agents of the Bank, and that if on the day the note was discounted they had knowledge of the dissolution of the partnership of Henry Baldwin, Jr., & Co., they were bound to communicate that knowledge to the Bank, and if they did not do so, they were guilty of fraud, and that the Bank, whose agents they were, and not the defendant, must suffer by that fraud."

It is unquestionably true, that fraudulent representations, or a fraudulent concealment of material facts by the agent, when engaged in the transaction of the business of the principal, will charge the latter, constructively through the agent. Story on Agency, 131; *Jeffry vs. Bigelow*, 13 Wend. 521; *Bank United States vs. Davis*, 2 Hill, 451. Every director of a Bank is its agent; appointed by the Bank, and held out to the public as entitled to confidence. And where a party has several agents, notice to one is notice to the principal, (as much so, as if all had notice,) in a case where the one thus having notice, is engaged in the transaction. 2 Hill, 464. We do not mean to say, that a director of a bank, having notice of the dissolution of a firm, with which it has been in the habit of dealing, is bound to communicate that knowledge to the other members of the board, unless he is called upon to act as director in a transaction affect-

[*Union Bank vs. Campbell.*]

ing the interests of the members of the partnership which has been dissolved, or unless the notice were given to him for the express purpose of being communicated to the board. *National Bank vs. Norton*, 1 Hill, 578. But in a transaction in which he acts as one of the board, notice to one director, is notice to the bank. Nor can it be necessary, that the notice shall have been communicated to him in relation to the particular transaction on which he is about to act. For if this were so, then would it be impossible for a retiring partner to avoid responsibility. Although he might give every director of a bank notice of the dissolution, yet his former partner might subsequently make a note in the firm name, and offer it for discount, when it would be impossible for him to know the fact, and communicate to the board anew the fact of the dissolution. All that is necessary, is, that the director, acting in the board when the note is offered for discount, should have knowledge of the dissolution. If he have such knowledge he is bound to communicate it to the board. We do not intend to controvert the general doctrine, that "notice must come to the agent while he is concerned for the principal, and in the course of the same transaction;" for notice to a party while he is not acting as agent, is certainly no notice to a principal for whom he may afterwards act. But the existence of *knowledge* in an agent, when acting for his principal, is notice to the principal, however that knowledge may have been acquired. Thus if an agent, in his own transaction, has had notice of a fact, that notice does not reach his principal, because he is not then acting for his principal; and before he comes to act as such agent, in relation to the subject about which he had notice, he may have forgotten the whole matter; so that it was never present in his mind, while discharging the duties of his agency. But if he had received the notice while he was concerned for the principal, the principal would be bound by it, though the agent might forget the facts, and have no memory of them, during the transaction to which they relate. But certainly, if while an agent is concerned, and acting for his principal, he have knowledge of the facts in relation to which notice is necessary, there can be no necessity for giving formal notice of the same facts, to the individual who already

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knows them. It would be very absurd to assume, that although every director may have notice of the dissolution of a partnership, and while on the board considering the propriety of discounting a note that purports to have been endorsed by the firm, they speak to each other of the fact of dissolution; yet, because notice of the dissolution was not communicated to them while thus concerned in this transaction, the Bank had no notice, and the retiring partner is bound. If such a proposition were law, it would be impossible for a retiring partner ever to get rid of responsibility.

But it is said, there was no evidence that these directors had the remembrance, or knowledge of the dissolution of the partnership of Henry Baldwin, Jr., & Co. when this note was discounted. It may be answered, that the jury had evidence that this knowledge had been previously communicated, and they had a right to take into consideration that fact, with all the circumstances attending the transaction, and judge, whether it was reasonably to be inferred, that the fact was remembered and the knowledge still existed.

It is said Tappan retired when the note was offered, and did not act as a director in discounting the paper. It may be answered, that his retirement to an adjoining room was a mere formality; that he was still a member of the board, and that as the note was offered by him, and discounted for his benefit, he was peculiarly bound to communicate the facts within his knowledge in relation to the dissolution, to the other members of the board, and not having done so, he was guilty of a fraud; the responsibility of which should fall on the Bank, whose agent he was, rather than on the defendant.

In the case of *The Bank of the United States vs. Davis*, 2 Hill's Rep. 451, Davis drew three bills of exchange, which were endorsed by Chatfield & Tisdale, and accepted by Holden, and were transmitted by the drawer to Williams, one of the directors of the Bank, for the purpose of having them discounted for the benefit of the former. Williams put his own name upon the paper, and procured it to be discounted for himself, and appropriated the avails accordingly; he at the time being one of the five directors constituting the board which discount-

[Gilliam vs. Bransford.]

ed the paper. His associates had no notice of the fraudulent use of the bills, and supposed the discount was made in good faith for himself. The Supreme Court of New York decided, that Williams was an agent of the bank, which should be deemed to have notice of the fraud, and that Davis was not liable to pay the bills.

We think there is no error, and affirm the judgment.

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GILLIAM vs. BRANSFORD.

Where a slave is hired or sold, the party who hires or sells such slave, is not bound to disclose a moral defect, unless the contract be made especially with a view to such quality.

This bill was filed by Gilliam against Bransford, in the Chancery Court at Franklin, to enjoin the collection of a judgment obtained upon a note given for the hire of a slave. The case was heard before Bramlitt, Chancellor, on bill, answer, replication and proof. He dismissed the bill, and complainant appealed.

*Meigs*, for complainant. See 2 Vernon, 122; 1 Maule & S. 517; 1 Burrow, 120; Chitty on Bills, 97; Story on Bills, 185.

*E. H. Ewing*, for defendant.

TURLEY, J. delivered the opinion of the court.

This is a bill to enjoin the collection of a judgment obtained by defendant against the complainant, for the hire of a negro man, upon the alleged ground, that the negro was addicted to stealing, which information was not communicated at the time of the hiring: that during the period for which he was hired by the complainant, he stole from him a large amount of property, more than sufficient to cover the amount of his hire; and claims relief from the judgment, upon the ground of fraud in not making the disclosure of his stealing propensities at the time of the hiring.



[England vs. Burt.]

Proof is taken, which shows that the negro had been hired to Yeatman & Co. previously, and had stolen from them. It leaves it uncertain, whether defendant knew of it; but that possibly her agent did.

The bill was dismissed upon two grounds:

1st. Because the jurisdiction was doubtful.

2d. Because the fact of the fraud was doubtful.

We are satisfied, the decree is right. Upon the first point, perhaps, weaker in expression, than it ought to have been. For we cannot see upon what ground a moral defect should be disclosed in the hire or sale of a slave, more than a vicious habit in a horse, or other animal, unless the contract be made especially with a view to such quality.

We know of no authority or principle sustaining the position contended for by the complainant.

The decree of the Chancellor, will, therefore, be affirmed.

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#### ENGLAND vs. BURT.

1. The Supreme Court will not set aside the verdict of a jury on matters of fact, unless there be a great preponderance of evidence against such verdict. This is a rule for the government of the Supreme Court, and not the Circuit Court. On the contrary, this rule of the Supreme Court imposes on the Circuit Court a heavy obligation to observe the rules of the common law, applicable to the granting of new trials *in nisi prius*, lest injustice be done.
2. Under the plea of *non est factum*, involving the existence of a partnership, the declaration of the defendant to third persons before the execution of the instrument in question, that no partnership existed, is not evidence. What the defendant said when the note was offered to him for payment, would be evidence; such declaration being a part of the *res gesta*.

This suit by warrant was instituted in the county of Franklin, before a Justice of the Peace thereof, by Burt against England, and a judgment was rendered for \$85, on a note signed "England & Hobbs." England appealed to the Circuit Court and the case was submitted to a jury at the November term, 1843; Marchbanks, Judge, presiding. The facts are all stated in the opinion of the court.

[*England vs. Burt.*]

*H. L. Turney* and *W. E. Venable*, for the plaintiff in error.

*Taul*, for the defendant in error.

REESE, J. delivered the opinion of the court.

Burt sued England before a Justice of the Peace, and the case was taken by appeal to the Circuit Court. The suit was brought to recover the amount of a promissory note for eighty-three dollars and six cents. The defendant filed a plea on oath, denying that the note, which was signed "England & Hobbs," was his act, agreement or promise; upon which issue was taken. On the trial, it appeared in evidence that England owned a spinning factory, which appeared to be under the superintendence and management of Hobbs. The note sued on and the signature is in the hand writing of Hobbs. Various persons, at different times, presented to England notes and accounts signed and stated in the names of "England & Hobbs;" and some of these were sued on; all of them were paid by England; in some instances after ascertaining by enquiry that they were for articles or services furnished to the factory, he stating at the time that for articles or services thus furnished, he would pay. On none of those occasions, and to none of those persons having notes and accounts in the name of England & Hobbs, did England state that he and Hobbs were not partners. To one person, with reference to one of the notes, he did say that Hobbs had no right to sign his name, and that he would not pay it unless it turned out to be for the use of the factory. It did so turn out, and he paid it. The plaintiff proved, that a negro girl slave of his worked some time at the factory; and he offered to prove that the consideration of the note was for work done or articles furnished at the factory; to which the defendant objected, and the court excluded the testimony. The defendant offered to prove by a witness, that he, witness, once enquired of defendant during the time Hobbs was at the factory, and before the date of the note, whether Hobbs was the partner of defendant. But the court ruled, that the witness should not answer the questions. The jury gave a verdict for the plaintiff

[England vs. Bart.]

for the amount of the note with interest, under a charge of the court, which the bill of exceptions states to have been unexceptionable. The court overruled a motion for a new trial, and is stated in the bill of exceptions to have observed on that occasion, "that he did not know whether, if he had been of the jury, he would have considered the evidence sufficient to have established the existence of a partnership; that he was satisfied, from the evidence, that the consideration of the note sued on was for articles furnished and used at the defendant's factory; that the justice of the case having been attained, he would not closely scrutinize the evidence upon which the verdict was founded."

This court inflexibly adheres, in questions of new trial in civil cases, to a rule long since laid down for its own government, and laid down with an anxious solicitude to be explicitly understood, not by the Circuit Judges, indeed, for whom it was never intended and to whose action it would be inappropriate, but by parties and counsel interested in bringing such cases into this court. And this rule we have had occasion to repeat, in numerous instances, at every term of the court during the last eight years. The rule is, that in matters of fact in civil cases, upon which a jury has rendered a verdict, which the Circuit Judge presiding has refused to set aside, we will affirm the judgment of the Circuit Court, unless there be a great preponderance of evidence against the verdict. This rule is here adopted upon the most obvious necessity. If four witnesses testify before the jury on the side of the plaintiff, to a given state of facts, and two witnesses testify to opposing facts, on the side of the defendant, and the verdict is for the defendant, and the presiding Judge refuses to set aside the verdict, how shall this court know, on what ground have they to believe, that the jury and Circuit Judge erred, and that the verdict and judgment should have been for the plaintiff? The verdict and judgment in such a case may have been just as they ought to have been. We do not see or hear the witnesses,—cannot mark their manner,—cannot be impressed with their greater or less intelligence; their greater or less respectability. Hence, as we have said, from the most obvious necessity, we have adopted, and we enforce the rule, from no affectation of any

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overweening respect or deference for the mere verdict of an ordinary jury, but *mainly* because we rely upon the enlightened judgment and dispassionate firmness of the Circuit Judge, presiding, who has heard all the proof, seen all the witnesses, weighed all the arguments, and to whom the very counsel who have argued the case, make the motion for a new trial, while the matter is yet recent. If this judge, whose duty it obviously is, to grant a new trial, if he is *dissatisfied* with the verdict, refuse, under such circumstances, to do so, how can we feel assured that we are not doing injustice here, to grant a new trial? But our rule, as we have said, is for ourselves; not for the Circuit Judges. And the fact that such is our rule, so far from absolving them from the observance of the common law rules applicable to the granting of new trials, in *nisi prius* courts, imposes another or weightier obligation to enforce those rules, lest injustice be done by permitting verdicts to stand which ought to be set aside. These remarks are not called for by any thing existing in this record; but we make them because we have been often assured of the existence of what seems scarcely credible, an opinion, on the part of some, that our oft-repeated rule was intended by us for adoption and observance by the Circuit Courts. The Judge in this case says he was satisfied with the verdict, and he let it stand; and there are facts proved in the record upon which it can stand. As the Circuit Court let it alone, so do we.

There was no error in the Circuit Court in refusing to permit the witness at the instance of defendant to state his response to witness's enquiry whether or not he was a partner of Hobbs. That enquiry was isolated; was not a part of any transactions arising in or connected with the case. What defendant said on the subject, when any note or account in the name of "England & Hobbs" was presented to him, it would have been competent to have heard as part of the *res gesta*. But the enquiry in question was of a different character.

We affirm the judgment.

**HOPKINS *et als.* vs. THE GALLATIN TURNPIKE CO.**

1. A corporation can exercise no powers but those which are expressly conferred upon it by the charter, or those which are necessary to enable it to carry into effect the purposes for which it was created.
2. A corporation has power to make a deed assigning its effects to a trustee for the benefit of creditors.
3. It is not necessary that the officer of a corporation making a deed on behalf of the corporation should be authorized by power of attorney to affix the seal of the corporation.
4. Where the president of a corporation makes a deed on behalf of the corporation and affixes the seal of the corporation thereto, it will be presumed, in the absence of proof, that he was duly authorized by a vote of the board to make the deed.
5. A corporation agreed with certain creditors, that if they would take stock in the company, their debts should be paid in bonds of the State of Tennessee, which the company would procure, provided they would take them at not less than eighty cents in the dollar. They subscribed. No order of the board was made for the assignment or delivery of the bonds to the creditors, and no assent on the part of the creditors had been made to take them at eighty cents in the dollar. The property, therefore, remained in the company, and the bonds were subject to the lien of the attachment.

Hopkins, Hall and others filed their bill in the Chancery Court at Gallatin against the "Gallatin Turnpike Company" and a part of the stockholders only, alleging that they were too numerous for all to be made parties, on the 28th day of February, 1842.

On the 10th day of March, 1842, Hanna and others filed their bill against the company and the stockholders, in the same court.

On the 15th day of March, 1842, James Key filed his bill against the company.

These complainants were all creditors of the corporation who had obtained judgments against it; who had procured executions to be issued, and they had been returned "no property found." These facts are set forth in the several bills. Hopkins, Hall and others had attached a portion of certain bonds of the State which were in possession of the company before the other bills were filed.

These bills alleged, that the company had made an assignment by deed of the property of the company in trust to B. Watkins, for the pretended purpose of securing certain creditors of and endorsers for the company.

[Hopkins et al. vs. The Gallatin Turnpike Co.]

This deed is exhibited, and was made before the several judgments were obtained.

This deed alleges the existence of certain debts not then due, and which the company owed; and to secure the payment of said debts, it sells and conveys in trust to B. Watkins "all the property of said turnpike company, to-wit: the turnpike road of said company, commencing at the city of Nashville and passing through the town of Gallatin to the Kentucky line, and all the gates and gate houses, the land upon which said gate houses are erected and all attached to the same, and tolls received at the gates on said road."

This deed authorizes and directs the trustees to appropriate the tolls received, first to discharging the expenses incidental to keeping the said road in repair, and the balance to the extinguishment of the specified debts.

It was signed by Samuel Anderson, "President of the Gallatin Turnpike Company," and the seal of the Company affixed.

The bills charged, that this deed was intended to hinder and delay creditors in the collection of their debts, and was fraudulent and void.

This was denied in the answer.

The bills also alleged, that the company had five thousand dollars in bonds of the State, which was the property of the company, and prayed the subjection of them to the satisfaction of their judgments. The answer alleges that these bonds were contracted to certain stockholders, who had taken stock upon condition, that they should have these bonds at 80 cents in the dollar, in discharge of certain debts the company owed such stockholders. Hopkins, Hall and others asserted a prior lien on the bonds by virtue of their attachment.

The bills prayed that the deed might be declared fraudulent and void, the road and its effects subjected to the satisfaction of the judgments, &c.

The answer of the corporation was replied to, and the individual stockholders demurred to the bill.

The several cases were consolidated on motion of the corporation; and no proof being taken, the case was heard before Chancellor Bramlitt, at the April term, 1843. He sustained

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the demurrer of the stockholders, and dismissed the bill as to them. He decreed the deed fraudulent and void, and appointed a receiver to receive the tolls, with instructions to distribute them, after discharging the expenses of repair, *pro rata* amongst the judgment creditors. The question of priority asserted by Hall, Hopkins and others, was reserved.

The Turnpike Company alone appealed.

*Trimble and Guild*, for the complainants.

*John J. White*, for the Gallatin Turnpike Company, said:— The only questions for discussion here, are, 1st, in regard to the validity of the deed of trust executed by the company on the 15th of October, 1840; and 2d, in regard to the \$5000 in bonds of the State of Tennessee.

And 1st, in regard to the trust. The charge in the bill is, that this deed was made to hinder and delay creditors in the collection of their debts, and is therefore fraudulent and void. The answer expressly denies this allegation, and the proof shows that it was made *bona fide*.

This deed is next attempted to be set aside, upon the want of authority in the company to execute such an instrument. And first, I contend that no such question can be raised upon the pleadings. There is no allegation in the bill of a want of authority in the company to execute such an assignment. On the contrary, this power is impliedly admitted. The only charge, is, that under the circumstances mentioned, the whole property being conveyed just before the complainants obtained their judgments, it is fraudulent and void. Upon this point, see *Carnel vs. Banks*, 10 Wheaton, 189; *Harding vs. Handy*, 11 do. 103; *Lyon vs. Tallmadge*, 1 John. Ch. 186.

But, 2d, with regard to the power of the company to execute such an assignment. That a debtor may by deed of trust prefer one creditor to another, when it is fair and *bona fide*, is a principle too well established to be shaken. 8 Yer. 134; 10 do. 146; 11 Wend. What is there that should prevent a corporation from doing the same thing, particularly one of this character? According to all the authorities, a corporation can exer-

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cise such powers as are specifically granted, or such as are incidental, or necessary to carry into effect the purposes for which it was established. 2 Kent's Com. 226, 1 ed.; 4 Wheaton, 636. And it was an incident at common law to every corporation to have a capacity to purchase and alien lands and chattels, unless they were specially restrained by their charters, or by statute. Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects nor circumscribed as to quantity. 2 Kent. 227, and authorities there cited. 4 Com. Dig. title *Franchise*, f. 11-18. Angell and Ames on Corp. 78, 80-5, 104; 2 Yer. 167. I take it, therefore, the company would have the power of making the conveyance without any particular authority given by the charter. It would be highly important for it to possess this power. This charter was granted for the purpose of constructing an important road from Nashville by Gallatin to the Kentucky line, and terminating upon the Ohio river at Louisville. It was indispensable for them sometimes to anticipate their resources, to borrow money, and to use their credit, in the construction of the road; and this could not be effected without pledging their means which were alone the proceeds of the road.

But if we look at the charter, we find ample authority given. Under the first section the company, among other things, is authorized and empowered to have and receive, purchase, possess, enjoy and retain lands, rents, goods, chattels, and effects of any kind, and to any amount necessary to carry into effect the object of the incorporation, and the same to use, alien and dispose of at pleasure; and by the 10th section, the turnpike road with all its appurtenances, together with all tolls and profits arising therefrom, are vested in the corporation.

These are very different from the cases in 15 John, 357, and 2 Cowen, 664-678, which decide that when a company is incorporated for the purpose of insurance against fire, it cannot carry on banking operations, discount notes and transact other business of incorporated banks. This is upon the principle, that when a bank is incorporated with certain powers granted by the charter, it cannot be permitted to exercise other powers



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wholly distinct, having no reference to the specified object of the incorporation, not incidental, or necessary to carry into effect the purposes for which it was established. But such is not this case, the exercise of a distinct power, inconsistent with or repugnant to the charter, but one necessarily flowing from it, the merely pledging the means of the company, for the security and the payment of their debts.

The exercise of this power by the company is fully sustained by the authorities. In the case of *Jackson vs. Brown*, 5 Wend. 590, it is decided that a corporation having power to convey real estate, may pledge it by mortgage, as security for the payment of its debts. The court say, "The general authority to sell and convey, includes the authority to mortgage. A mortgage is but a conditional conveyance. It would be very extraordinary if this or any other corporation had not the power to appropriate its property to the payment or security of its honest debts." So here, this corporation has the power to purchase and convey real estate, as well as rents, goods, chattels and effects of any kind, which are vested in them for the purposes contemplated by the charter. The road likewise, and the tolls and profits arising from the same, are vested in the company, and which consequently they have the right to use for the security and in payment of their debts, which is all that is done by this conveyance. See, too, the case of *James S. Conway et al.* assignees of the Real Estate Bank, decided by the Supreme Court of Arkansas, 4 Arkansas Reports, 325, where the power of a corporation to make an assignment of its assets in payment of its debts, is elaborately and ably examined, and the court determined in favor of the exercise of the power. Also *Cutlin vs. The Eagle Bank*, 6 Conn. Rep. 233; *Savings Bank vs. Batin*, 8 do. 512; 4 Gill & John. 219; 6 do. 375; *The Union Bank of Tennessee vs. Elliott and others*.

With regard to the power of the president of the company to execute the deed, that is settled in 4 Yer. 9, *Durnell vs. Dickins*. See too Angell and Ames, 114-15, sec. 7 and notes; and the Real Estate Bank case before referred to.

Third; with regard to the \$5000 in bonds of the State of Tennessee, which is claimed in these bills. The allegation of

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the bill is, that there are certain bonds, the *property* of the company, in possession of the president or secretary. Defendants deny this, and say they belong to other individuals, naming them, who are creditors, and there the matter rests. Complainants do not amend their bill and make these individuals parties, and charge the fact that they are not entitled to these bonds, and thus place it in issue between them; of course, the answer being responsive to the bill, is conclusive upon this point. It cannot be said that this is a matter in avoidance, and must therefore be proved.

GREEN, J. delivered the opinion of the court.

These are several distinct cases; but in each, the Gallatin Turnpike Company and some of its stockholders are made defendants; and the complainants seek to render liable to the satisfaction of their debts, certain bonds of the State which are held by the company, to have the road placed under the control of a receiver, and its profits applied to the liquidation of their debts, and to subject the stockholders to contribution, or the stock to sale.

It is alleged in the bills, that the road, gate and gate houses, have been conveyed to one B. Watkins, to save harmless certain sureties or endorsers of the company; and that the deed was made in favor of creditors, or that the debts secured thereby have been paid, or nearly so, by the receipts from the road. It is also alleged, that the company had State bonds to the amount of 5000 dollars in the hands of its officers, and that these bonds are choses in action, liable in equity to the payment of complainants' debts.

The answer of the company denies that the deed to Watkins was made to hinder or delay other creditors; but that, having borrowed of the Bank of Tennessee a considerable sum of money for which personal security was given, this deed was made *bona fide*, to indemnify and save harmless the endorsers, and that but little profits have been realized, the expenses in the construction of a bridge and keeping the road in repair, having been considerable.

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With regard to the State bonds, the answer states, that in the spring of 1841, there was an attempt made to get the company out of debt, by procuring additional subscriptions to stock, on the part of stockholders who were creditors, and which would entitle the company to an equal amount to the individual subscription in State bonds. The amount subscribed by individuals was twenty thousand dollars, and the company consequently obtained twenty thousand dollars in State bonds. Each stockholder was entitled to an amount in bonds equal to his subscription of stock; that is to say, if he subscribed \$500, or any other given sum, he was entitled to that amount in a State bond, if the balance of his debt would amount to that much. They were not, however, to get the bonds under an order of the board, unless they would allow eighty cents in the dollar for them. "The company have gone on, and paid fifteen thousand dollars. The condition upon which they subscribed to the stock was, that they should be entitled to these bonds." The defendant therefore denies that these bonds are liable to the satisfaction of complainants' debts.

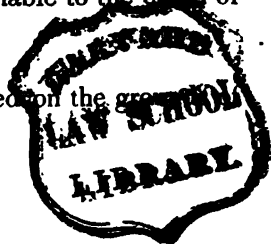
The answer was replied to, and the causes were brought to a hearing without proof. His honor the Chancellor decreed that the deed to Watkins was void, and the road should be placed in the hands of a receiver; that the five thousand dollars of State bonds were liable to these creditors; and that the complainants, and all other creditors, who would file their claims, and contribute to the expenses of the suit, should be paid *pro rata* by the proceeds of the road; and as to the bonds, the question of priority was reserved.

The bills were dismissed as to the other defendants. The turnpike company alone appealed to this court.

Inasmuch as the individual stockholders are not before this court, no appeal having been taken from the decree dismissing the bill as to them, the questions now to be considered are, first, as to the validity of the deed of assignment; and, secondly, whether the \$5000 of State bonds are liable to the claim of the complainants.

1st, as to the validity of the deed.

The charge in the bill attacks this deed on the ground



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fraud in its execution. This charge is specially denied in the answer, and there is no proof. But it is contended *here' now*, that this deed is void:

1st. Because the corporation has no power to make a deed of assignment of its effects to secure creditors.

2d. Because the deed purports to have been executed in the name of the corporation, by S. R. Anderson, its president; and no power of attorney, under seal, is shown, authorizing him to make the deed.

3d. Because it does not appear that there was any vote of the board of directors, authorizing and empowering the president to affix the seal of the corporation to this deed.

1. As to the question, whether the corporation has power to make an assignment of its effects for the security or in payment of its creditors, there can be no doubt.

It is certainly true, that a corporation can exercise no powers that are not granted in the charter, or that are not incidental or necessary to carry into effect the purposes for which it was created. 2 Kent, 226, 1 ed. But these powers it may exercise as fully as a natural person can do.

At common law, it is an incident of a corporation to purchase and alien lands and chattels, to any extent, unless restrained by statute. 2 Kent, 227. But the charter of this corporation expressly confers the power to purchase "lands, goods and chattels to any extent necessary to carry into effect the objects of the incorporation," and "the same to use, alien and dispose of at pleasure." If the corporation may dispose of its property at pleasure by an absolute sale, certainly there can be no reason why it may not assign its property, or the profits of its business, to a trustee, for the payment of debts. That a corporation may make an assignment, see 6 Connecticut Rep. 233; 8 do. 505, 512; 6 Gill & John. 375; 4 do. 219. See also a late case, of *Beckwith vs. The Windsor Manufacturing Company*, 14 Connecticut Rep. 594, and the late cases of *Dana vs. The Bank of the United States*, decided by the Supreme Court of Pennsylvania, and the case *ex parte James S. Conway*, decided by the Supreme Court of Arkansas.

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2. But it is said, the agent to execute the deed should have been authorized by a power of attorney under seal.

We cannot regard this objection as valid. The common law rule, with regard to natural persons, that an agent, to bind his principal by deed, must be empowered by deed himself, cannot, in the nature of things, be applied to corporations aggregate. These beings of mere legal existence, and their board, *as such*, are, literally speaking, incapable of a personal act. They direct or assent by vote; but their most *immediate* mode of action must be by agents. If the corporation or its representative, the board, can assent primarily by *vote* alone, to say that it could constitute an agent to make a deed *only by deed*, would be to say that it could constitute no such agent whatever; for after all, who could seal the power of attorney, but one empowered by vote? Angel and Ames on Corpo. sec. 7. The Supreme Court of Connecticut, in the case of *Beckwith vs. Windsor Manufacturing Company*, before referred to, (14 Conn. R. 603,) in answering this objection, say: "The corporation could only act in making the conveyance, by some agent or officer of theirs; and were it necessary for the vote to be executed with the same formality as the deed, a similar difficulty would arise in the execution of that." From the necessity of the case, therefore, the common law rule, as applied to individuals, cannot exist in relation to corporations aggregate.

3. Objection is made, that no vote of the board appears in this record, authorizing the execution of this deed, or assenting to it.

It is laid down by Angel & Ames on Corporations, 115, that when the common seal of a corporation appears to be affixed to an instrument, the seal itself is *prima facie* evidence that it was affixed by proper authority; and the contrary must be shown by the objecting party.

In the case before us, the deed has the corporation seal affixed to it; and it is not even alleged in either of the bills, that it was placed there by the president without authority. On the contrary, the statement in each of the bills impliedly admits the regularity of the *execution* of the deed. They allege that the *deed was* executed; but they insist it was made in fraud of their rights.

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We think, therefore, on this part of the case, that the corporation had power to make this deed; that a power of attorney under seal to authorize the president to affix the corporation seal, was not necessary; that the existence of the seal of the corporation to the deed, is *prima facie* evidence that it was affixed by proper authority; and that it was made *bona fide* to secure the payment of a just debt; and consequently it is a valid conveyance, and cannot be set aside, in behalf of these creditors.

2d. We are next to consider the question as to the State bonds.

We think the 5000 dollars of bonds which remain in the hands of the company undisposed of, belong to the company, and are choses in action liable to the satisfaction of complainants' debts. That these bonds do not belong to the creditors, who had subscribed stock, is manifest from the facts stated in the answer of the defendant. The bonds had been obtained about a year before these bills were filed, and yet they had not been transferred to these creditors. Besides, the answer states that there was an order of the board, that the creditors who had thus subscribed for stock should be entitled to an equal amount in bonds, only on condition that they would allow eighty cents in the dollar. This proves that there was no contract creating an ownership, on the part of the creditors, of the bonds in question. They remained the property of the company, and it was understood that these subscribers for stock were to be preferred creditors, to be paid in the State bonds, provided they would receive them on the condition before mentioned. Until the creditors agreed to this condition and received their payment, the bonds remained the property of the company. As such, they are liable to these complainants' debts. In the application of this fund, a question of priority arises between the complainants in these several bills. Hopkins, Hall and others filed their bill first, and obtained an attachment and injunction, to the amount of three thousand dollars of these bonds. The other bills were subsequently filed; and in these cases no other attachment issued.

The first bill, of Hopkins, Hall and others, filed under the act

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of 1832, ch. 11, (Nich. & Car. 222,) gives them a priority of lien, to the amount of the bonds by them attached; so that \$3000 of these bonds must be sold for their benefit. See 2 Paige's Ch. Rep. 567, *Corning & Norton vs. White*. The remaining two thousand dollars of bonds will be sold, and all the creditors in the two last bills filed will receive of the fund *pro rata*.

The decree must be reversed, and decree according to the foregoing principles.

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UNION BANK vs. OSBORNE.

The Union Bank purchased a note payable to Chaffin, Kirk & Co. It was endorsed by Kirk, in the name of Chaffin, Kirk & Co. a dissolved firm, and subsequently endorsed by Osborne, for the accommodation, as he supposed, of Chaffin, Kirk & Co. The Bank, at the time of the purchase, was aware of the fact of the previous dissolution of the firm of Chaffin, Kirk & Co. Held, that the Bank was not bound to communicate this knowledge to Osborne, and that a failure so to do did not discharge Osborne.

This action of assumpsit was instituted in the Circuit Court of Maury county, by the Union Bank, against Osborne, as endorser of a promissory note. Osborne pleaded *non est factum*, and an issue thereupon was submitted to a jury at the January term, 1843, Dillahunt, Judge, presiding. A verdict and judgment were rendered in favor of the defendant. The plaintiff appealed.

*Frierson*, for plaintiff.

*Cahal* and *White*, for defendant.

GREEN, J. delivered the opinion of the court.

This is an action brought by the Union Bank, as the holder of a note for \$4224 42, drawn by Yerger, Shall & Co. payable to Chaffin, Kirk & Co. and by them endorsed, and also endorsed by Thomas Gregory and the defendant Osborne. On the

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trial there was evidence conducing to prove that Osborne endorsed the note for the accommodation of Chaffin, Kirk & Co. It was also proved, that John Kirk had endorsed the note in the name of Chaffin, Kirk & Co. he being one of the partners of that firm. There was evidence that, before the Bank discounted the note, a publication had been made in several gazettes announcing the dissolution of the partnership of Chaffin, Kirk & Co. and that the Bank was a subscriber for one of these gazettes, and that the cashier of the Bank had knowledge of the dissolution.

The court charged the jury, among other things, that "If the jury should believe that the firm of Chaffin, Kirk & Co. was dissolved before the defendant endorsed the note, and that the plaintiff had a knowledge or notice of that fact; and if the jury should farther believe that the defendant was an accommodation endorser on the paper and the plaintiff knew that he was an accommodation endorser, and that the defendant did not know of the dissolution of the firm of Chaffin, Kirk & Co. at the time he endorsed the note, that in that case the plaintiff took the same in fraud of the rights of the defendant, and could not therefore recover against the defendant upon said endorsement:" that "if the plaintiff knew of the dissolution of Chaffin, Kirk & Co. at the time they discounted the note, and that the defendant was an accommodation endorser on it, they were bound to communicate that knowledge to the defendant before they took the paper, unless the jury should believe, from the proof in the cause, that the defendant had notice of that dissolution at the time the plaintiff discounted it."

Several questions have been elaborately debated at the bar in this case, but we do not deem it necessary to enter into an examination of all the points which have been made by counsel. As to whether the mere concealment of facts extrinsic of a contract, which may affect the interest of the other party, will constitute fraud, in a legal sense, so as to vitiate the contract, jurists are not agreed. Unquestionably, a high morality requires that we should disclose to a person, with whom we are about to make a contract, every fact touching the article which is the subject of the contract—which affects its value, and



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which we have reason to believe the other party does not know. A corn merchant, who arrives with a cargo at port in a time of scarcity, ought, perhaps, before he sells his corn for the highest price he can obtain, to disclose the fact that there were many other vessels loaded with corn on the way; because he ought not to prefer his interest to the interest of his neighbor, so as to make an advantage to himself by the losses of others. But no writer has ever supposed that such a system of morality as this can be enforced in a civil forum. Chief Justice Marshall said, in the case of *Laidlaw vs. Organ*, (2 Wheat. 178,) that a party was not bound to communicate extrinsic circumstances which would influence the price of a commodity, though the facts were exclusively within his knowledge: "But at the same time each party must take care not to say or do any thing calculated to impose on the other. It would be very difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are accessible to both parties." The interests of commerce require that parties shall not be permitted to set aside their contracts with too much facility.

It would be difficult, therefore, to maintain the doctrine of the charge of his honor the Circuit Judge, if the decision of this case depended upon our judgment upon this question. But from the evidence in the case, there was no ground for assuming the probable ignorance of the defendant, of the dissolution of the firm of Chaffin, Kirk & Co. at the time he endorsed the note in question. The fact of the dissolution had been published in several gazettes. There is no evidence that the defendant had been a previous dealer with the firm; and if he had not, publication of the dissolution in a gazette, as a matter of law, was constructive notice to him. If the Bank had obtained knowledge of the dissolution, by means of the publication in the gazettes, what right had they to suppose that the defendant, to whom the same sources of information were accessible, had remained in ignorance of the fact? And how can the plaintiff be chargeable with fraud, for failing to communicate *that* which the gazettes had announced, and which there was every reason to suppose the defendant already knew? But the defendant is reduced to this *dilemma*. He either knew

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the fact of dissolution, or he did not know it. If he knew it, the failure of the Bank to communicate the knowledge could not affect him, and consequently could be no fraud upon him. If he did not know it, then the existence of the fact could not prevent a recovery by him against all the partners; and consequently, as he could experience no loss in consequence of his ignorance of the fact, the failure to communicate it could be no fraud upon him.

It will not do for the defendant Osborne to assume, in behalf of the partners of Kirk, that they may be made liable thus by circuitry, when they could have resisted a recovery against them by the Bank. Osborne has nothing to do with the consequences to other parties. If he has all the remedies which he supposed he had, when he endorsed the paper, he had no right to complain. He is in the predicament in which he chose to place himself, and in which he expected to stand. The consequences upon *others* can be no fraud upon *him*. The statement of the proposition, presents the question in a light too clear to admit of an argument. The case of *Livingston vs. Hastil*, (2 Caines' R. 249,) is opposed to this view of the case. But the part of the case applicable to this point received but little attention in the opinion of the court; and is so manifestly opposed to principle, that we feel no embarrassment in disregarding it.

The question is one of fraud, as between the *plaintiff* and *defendant*, and yet the court made the effect which is to be produced on a *remote* party, exonerate the defendant, although they admit *his* remedies would be as complete as though all the parties had been liable to the holder.

Surely this can have nothing to do with the question whether the defendant has been defrauded.

The other cases cited from the New-York reports, so far as they effect this question, refer to the case of *Livingston vs. Hastil*, and rest wholly upon its authority.

For these reasons we think there is error in the judgment of the Circuit Court, and that it must be reversed and the case remanded for another trial.

CUNNINGHAM *et als.* vs. WOOD *et als.*

1. Though the same strictness in pleading be not required in Courts of Chancery as in Courts of Law; yet to authorize a decree in favor of complainant, the facts on which a decree is sought must be set forth in the bill, or in the answer.
2. The bill alleged a joint ownership of the estate sued for in complainants, and the proof showed an ownership in one of them: Held, that complainants were entitled to a joint decree for the estate.
3. Where one of several joint owners of slaves, illegally sells the slaves, the others have a right of action against the vendor, but no trust results when the proceeds is vested in other slaves or estate.
4. Where the estate of A was sold by B, and the proceeds vested in other estate in the name of B, under circumstances which created a resulting trust in favor of A, the equitable estate of A could not be reached by *s. fa.* at the instance of his creditors.

*Ready*, for the complainants.

*Wisener*, for the defendants.

GREEN, J. delivered the opinion of the court.

This bill is filed to restrain the sale of a negro, which was levied on by the defendant, Wood, a Constable, as the property of Giles R. Bowers, at the instance of the defendants.

The proof is conclusive, that Giles R. Bowers purchased the negro with the money of the complainant, Martha Cunningham, and as her agent, for her; and that she went into the possession of Mrs. Cunningham immediately after the purchase, and so remained in her possession until the defendant levied on her as the property of Bowers.

But it is said, that the case made by the proof, differs so widely from that made in the bill, that no decree can be pronounced.

It is certainly true, that a recovery cannot be had by a party, on the proof *alone*; the *facts*, constituting the *case*, upon which the decree is sought, not having been set forth, either in the bill or answer. But it is also true, that the same strictness of pleading, is not required in Courts of Chancery as in Courts of Law. If the *facts* which constitute the ground of equitable jurisdiction, are stated in the bill, it is sufficient, although it may be encumbered with much irrelevant matter. In this case, the bill

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is filed by Martha Cunningham alone, and states, that her father, John Bagby, devised to her a negro man, Lewis, for her separate use; that she sold said negro for twelve hundred dollars, and that with four hundred dollars of that sum, she directed Giles R. Bowers to purchase the negro in dispute, which he accordingly did. An amended bill was filed, stating that from a reference to the will of John Bagby, it will be seen, that instead of devising the negro Lewis to Martha Cunningham alone, he was devised to her, and her children, James, Martha, Margaret, Jane, Angelina and Mary Ann, all of whom (except Mary Ann,) are made complainants, and the said Mary Ann, (who is the wife of the defendant, Giles R. Bowers,) is made a defendant. In other respects, the allegations of the original bill are repeated, and a decree in favor of all the complainants is prayed for.

Now, so far as the controversy between the complainants and the defendants is concerned, there is no discrepancy in the statements of the original and amended bill. In each, a title is set up against the right of Bowers to the negro, and consequently against the right of the other defendants, to have satisfaction of their executions by causing her to be sold. And in each the title is traced to the same source; namely, the sale of negro Lewis, who was devised in John Bagby's will. But it is said, the evidence does not prove that the money with which the negro in controversy was purchased, was part of the proceeds of Lewis. The answer is, Mrs. Cunningham and her husband, admit, and state in the amended bill, that such was the fact. The defendants have no right to dispute this fact, or to require that it be proved. When the evidence shows beyond doubt, that Mrs. Cunningham furnished the money, and directed the negro to be purchased for her, a right to the negro in one of the complainants is clearly established: the right of the other complainants necessarily flows from the fact, that she joins them in the suit, and alleges in the bill, their joint interest. If two join in a bill for the recovery of an estate, and it turns out in the proof, that one of them furnished to the agent, who made the contract, the entire sum with which the estate was purchased, would it ever be thought that the defendant could

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object to a decree in favor of both, because it was not proved that the fund belonged to both, although the bill of both expressly so charged? Surely not. And such is precisely the present case.

But it is said, if the negro, Malinda, is to be regarded as having been purchased with the proceeds of negro, Lewis, the defendant, Bowers, in right of his wife Mary Ann, one of the daughters of the complainant, Martha Cunningham, was part owner of Malinda, and that his interest in her was liable to seizure and sale, by virtue of the executions against him. This does not follow as a consequence, Mrs. Cunningham furnished the money for the purchase of Malinda, and acquired through her agent, Bowers, an exclusive title to her. If she obtained that money by the sale and conversion of negro Lewis, her children who were joint owners of Lewis, would have an action of trover against her for their respective shares, as was decided the present term in the case of *Rains vs. McNairy*. No trust would result to them by the purchase of Malinda, for the money obtained by the sale of Lewis, had been loaned to Davis & Fraser, and the four hundred dollars that was given for Malinda, was paid, by Mrs. Cunningham's order, by Davis to Barnes; and with this four hundred dollars Malinda was purchased; so that the purchase was not made with the money of her children, so as to create a resulting trust in their favor. It may be, that equity would hold her a trustee for them, by reason of the fiduciary relation existing between the mother and her children, and if need be, for the attainment of justice, might follow the fund, and give to the joint owners the benefit of the acquisition of Malinda, although she was purchased in the name and for Mrs. Cunningham alone. In this point of view, the share of Bowers was not liable to be seized and sold by virtue of an execution at law; but as Mrs. Cunningham and her husband, Richard Cunningham, have admitted in the amended bill, that the price paid for Malinda, constitutes part of the price obtained for Lewis, and as they pray, that Malinda shall be held by the parties in the same way the will of John Bagby had placed Lewis. If these execution creditors of Bowers, who are defendants, had filed a cross bill for that purpose, they

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would have been entitled to a decree for the share of Bowers. But this has not been done.

The only question then is, whether they shall be perpetually enjoined from proceeding in the execution of their judgment against Bowers, by the sale of the slave in controversy. And we are clearly of the opinion that this shall be done.

Let the decree be reversed, and reformed according to this opinion.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF TENNESSEE.**

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**JACKSON, APRIL TERM, 1844.**  
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**MACON vs. THE STATE.**

The act of 1831, ch. 103, sec. 3, prohibits slaves from practising medicine under all circumstances.

Macon was the owner of a slave, Jack, and permitted Jack to go about the country practising medicine, and with the purpose of healing the sick.

He was indicted in the Circuit Court under the act of 1831, ch. 103, sec. 3, pleaded not guilty, and at the January term, 1844, the case was submitted to a jury, Dunlap, Judge, presiding. It was admitted by the defendant, that he had permitted the defendant Jack to practise medicine in the county of Fayette, and that he had gone at the call of all persons who were sick, and administered medicine, and acted in the capacity of Physician.

The defendant introduced proof, that the defendant was an obedient, exemplary slave, and a most successful practitioner of medicine; that he had performed many cures of a most extraordinary character, and that his character was so well established for skill in the art of healing the sick, that all his time

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was occupied in attending the calls of afflicted and diseased persons, &c.

The counsel for the defendant requested the court to charge the jury, that if the going about the country was for the purpose, in good faith, of practising medicine and healing the sick, and, that he did not hold forth this profession as a cloak, pretence or pretext for the purpose of accomplishing other unlawful designs, that he was not guilty under the provisions of the statute. The court refused so to charge, but charged the jury, that a slave had no right to practise medicine under any circumstance.

The jury returned a verdict of guilty. A motion for a new trial having been made and overruled, the defendant made a motion in arrest of judgment. The motion was also overruled, and the defendant having been fined one dollar, appealed.

*Coe*, for the plaintiff in error.

*Attorney General*, for the State.

GREEN, J. delivered the opinion of the court.

This is a presentment for permitting a slave to go about the country, under the pretext of practising medicine. It is admitted the slave, Jack, owned by the defendant below, did practice medicine extensively with the permission of his master. It is insisted, however, that he did not make a pretext of practising medicine for the accomplishment of any unlawful ends, but that he is a *bona fide* physician, of skill and character, and that he had no other object in going about the country, than to heal the sick, who desired his services. And such a case, it is contended, does not fall within the provisions of the act of 1831, ch. 103, sec. 3, (C. & N. 262.) The language of that act is: "If any owner or other person, having the charge of a slave or slaves, shall permit him or them to go about the country under the pretext of practising medicine, or healing the sick, he, she, or they shall be liable to presentment or indictment, as in the preceding section of this act; and such slave on arrest and



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conviction, shall receive, by the order of the Justice trying him, a number of lashes not exceeding twenty-five."

The context of the act shows, that the legislature was guarding against seditions, or insurrectionary movements on the part of the slaves. The better to prevent such disturbances assemblages of slaves, in unusual numbers, or under suspicious circumstances, are prohibited, unless expressly authorized by the owners. And any person knowingly permitting such assemblages on his land or premises, may be presented or indicted, and on conviction, fined at the discretion of the court.

Then comes the third section above quoted. The object of this section is the same indicated in the preceding section. A slave under pretence of practising medicine, might convey intelligence from one plantation to another, of a contemplated insurrectionary movement; and thus enable the slaves to act in concert to a considerable extent, and perpetrate the most shocking massacres. To prevent this, it was thought most safe to prohibit slaves from practising medicine altogether. And this we understand is the meaning and import of the third section of the act of 1831.

It is true, the word "pretext" is used, but we understand the legislature as assuming, that the practice of medicine by a slave, would be a pretext.

If the State must show, that the slave, really in point of fact, had some unlawful design, and the practice of medicine was a mere pretence to cover that design, the object of the law would be wholly defeated. The evil which the law intended to prevent, must have already existed, thereby to establish the pretext. But the whole scope of the statute shows, that the object was to prevent the dreaded dangers, by punishing such acts as might tend to produce or facilitate the execution of the evils which a prudent foresight contemplated as probable.

We think, therefore, that there is no error in this record, and order that the judgment be affirmed.

## INGRAM vs. WILSON.

An order appointing a jury of freeholders to view and lay out a public road, is an order laying out a public road within the meaning of the act of 1804, ch. 1, sec. 1, and, therefore, such an order, made by less than twelve Justices or one-third of the Justices of the county, is void by the act of 1817, ch. 48.

John Ingram made an application by petition, to the county court of Madison, to lay out a road in the said county. The County Court (three Justices only being present,) made an order, appointing a jury (seven in number,) "to view and mark out a road, from Clover creek road to Greenleaf's old mills, and report to the next term of the court." The jury marked out a road and reported the designations thereof to the court; and that it was laid out to the greatest advantage of the inhabitants, and with as little prejudice as possible to enclosures.

Joab Wilson appeared and contested the reception and confirmation of said report, and was made a party defendant on the record. The court (twelve Justices being present,) ordered, that the report be received and confirmed, and the road established.

The defendant, Wilson, appealed to the Circuit Court. The court, Read, Judge, presiding, being of opinion, that the order, appointing a jury of view, was void for want of a competent court, dismissed the petition at the costs of the petitioner. The petitioner appealed.

*Huntsman and Scurlock, for Ingram.*

*Talbot, for Wilson.*

GREEN, J. delivered the opinion of the court.

This case originated in an application to the County Court of Madison county, to lay out a public road. The road was ordered to be opened by the County Court, and an appeal was taken to the Circuit Court. The Circuit Court reversed the judgment of the County Court, and an appeal was taken to this court. In the County Court, (where the proceedings originated,) there were only three Justices of the Peace present, hold-

[Ingram vs. Wilson.]

ing the court, when the order, appointing a jury of view to lay out the road, was made. And the only question now is, whether a less number of Justices than twelve, or one-third, will constitute a competent court to appoint a jury of view to lay out a public road. The act of 1804, ch. 1, sec. 1, authorizes the County Courts to order the laying out of public roads, where necessary, "*Provided*, that a majority of the acting Justices be present." A subsequent act of 1817, ch. 48, prescribes, that one-third, or twelve Justices shall be competent to transact all kinds of public business.

It is admitted by the plaintiff in error, that the final order, laying out a public road, must be made by at least twelve, or one-third of the Justices; but it is contended that the office of the jury of view is only to report facts for the information of the court; that nothing they do is obligatory until their report is confirmed by the court, and, therefore, the act of Assembly should not be construed to require the presence of more than three Justices, in taking this initiatory step.

Without entering into a discussion of the reasons of the legislature for requiring so large a number of the Justices to be present, when a certain description of public business is to be done, it is enough to know what has been enacted upon this subject. It is declared in the section of the act of 1804, above referred to, that to make an order, laying out a public road, a majority of the Justices must be present. The question then presents itself, is the order appointing a jury of view, in this case, one for laying out a public road?

This question is fully settled by the third section of the act of 1804. It provides, that "all roads to be hereafter laid out, shall be laid out by a jury of freeholders, to consist of not less than five, nor more than twelve, to the greatest advantage of the inhabitants, and as little as may be to the prejudice of enclosures, which laying out shall be on oath," &c.

Here it is expressly enacted, that all public roads shall be laid out by a jury of freeholders. The order of court appointing these freeholders, and empowering them to lay out the road, must, therefore, be an order for laying out a road, within the letter and plain meaning of the first section of the act of 1804.

[*McAlister vs. Marberry.*]

And in this case, the order did appoint the persons therein named, "to view and mark out a road," &c., thereby conforming to the statute, and making it an order for laying out the road in question.

This order three Justices had no power to make, and the whole proceeding was without jurisdiction and void.

### MCALISTER vs. MARBERRY.

McAlister bound himself by covenant, to pay for Robinson certain debts due by Robinson to Marberry. Marberry instituted an action of covenant against McAlister on the instrument: Held, that he had no legal interest therein, and that the action would not lie.

Covenant by Marberry against McAlister, in the Circuit Court of Obion county. McAlister pleaded two pleas, which were demurred to; the demurrers were overruled by Harris, the presiding Judge, and a writ of enquiry awarded; damages assessed; judgment rendered, from which McAlister appealed.

*Brown and McAlister*, for the plaintiff in error.

*S. Williams*, for the defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action of covenant, brought by Marberry against McAlister, on the following instrument, viz:

Bank debt,	-	-	-	-	-	-	\$343 48
Marberry,	-	-	-	-	-	-	96 00
Waggers,	-	-	-	-	-	-	10 00
McAlister,	-	-	-	-	-	-	49 41
Marberry,	-	-	-	-	-	-	1 22
							<hr/>
							\$500 11

I will pay the above debts for Samuel and Samuel M. Robinson for two negro boys, with interest and cost, when it was to be paid, and the boys delivered to me, this 26th January, 1843.

C. MCALISTER, [Seal.]

[Davis vs. The State.]

The defendant pleaded two pleas, to which the plaintiff demurred.

As the demurrer reached the first fault in pleading, the question is raised, whether Marberry can maintain an action for the sums which, in the memorandum in the covenant, appear to be due him from the Robinsons, and which McAlister bound himself to pay. In this case the covenant is made with the Robinsons; and McAlister engages with them, to pay for them, to the several persons mentioned in the memorandum, the sums therein stated. The covenant creates no obligation from McAlister to Marberry; but it is an undertaking to Samuel and Samuel M. Robinson, to pay Marberry for them the sum mentioned. Marberry has no legal interest created by this covenant, and he cannot, therefore, sue in his own name upon it. 1st Chitty, 3, 4.

The judgment must be reversed.

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#### DAVIS vs. THE STATE.

1. The 5th and 6th sections of the act establishing a Criminal Court for certain Civil Districts in the county of Shelby, confer exclusive jurisdiction of all offences committed after the passage of the act; and expressly reserves to the Circuit Court jurisdiction of all offences committed prior to the passage of the act. The 10th section of the act repeals all laws giving to the Circuit Court jurisdiction of offences: Held, that the several sections must be construed in reference to each other, and that the 10th section repealed all the existing laws, giving jurisdiction to the Circuit Court of offences, except jurisdiction of the class of cases reserved in the 5th and 6th sections.

Davis committed a larceny in the city of Memphis, prior to the passage of the act establishing a Criminal Court there. He was found guilty by a jury in the Circuit Court of Shelby county, Dunlap, Judge, presiding. He moved in arrest of judgment on the ground, that all laws giving power to the Circuit Court of Shelby county, to try him, had been repealed by the 10th section of the act establishing the Criminal Court. This motion was overruled, and judgment rendered against defendant, from which he appealed.

[Davis vs. The State.]

*Shields*, by appointment of the court, argued this case for the plaintiff in error.

*Attorney General*, for the State.

REESE, J. delivered the opinion of the court.

The defendant was indicted and convicted for a larceny, committed at or near Memphis, in the Circuit Court of Shelby county. The offence was committed prior to the 14th day of December, 1843, at which time the act establishing a Criminal Court for the Civil Districts in Shelby county, in which the City of Memphis, South Memphis and Fort Pickering is situated, was passed by the legislature of the State. The 5th and 6th sections of the act, gives the said Criminal Court exclusive jurisdiction, within said district, of all offences before cognizable in the Circuit Court, expressly reserving to the Circuit Court jurisdiction of all offences committed prior to the passage of the act. The 10th section of the same act is in the following words: "*Be it enacted*, That all laws giving to the Circuit Court of Shelby county jurisdiction of crimes and criminal offences, within the above named district or districts, or so much thereof as give such jurisdiction, be and the same is hereby repealed." It is insisted here for the defendant, that this section has the effect to deprive the Circuit Court of Shelby county of the jurisdiction expressly reserved for it in the 5th section. With this view of the matter we can by no means agree. The jurisdiction of the Criminal Court was intended to be exclusive, but altogether prospective. And it is with a view to make certain this exclusive prospective jurisdiction, that the 10th section was enacted; it would be a strange construction, which would deprive the Circuit Court of a jurisdiction reserved by the 8th section of the statute, and which is not conferred on the Criminal Court.

We affirm the judgment.

## THE STATE vs. PRIDDY AND RAY.

An indictment for an affray must charge a *fighting by two or more persons* in a public place. It will not be good if it only charge, that they "made an affray." It must charge the facts which constitute the offence, and not merely the technical designation thereof.

At the November term, 1842, of the Circuit Court of Henderson county, the grand jury returned a presentment, which charged, that James Priddy, Granville Priddy, James Ray and W. Eubanks, within the county of Henderson, on 25th day of July, 1842, "with force and arms, being unlawfully assembled together, and arrayed in warlike manner, then and there, in a public place, unlawfully and to the great terror and disturbance of all the good citizens of said State, then and there assembled, *did make an affray* in contempt of the laws," &c.

The defendant by his attorney, Bullock, moved the court to quash this presentment. The motion prevailed, and the presentment was ordered to be quashed. The Attorney General appealed on behalf of the State.

*Attorney General*, for the State. This indictment is good, it being a copy from the form laid down in Archbold, p. 450. The charge, that the party made an affray, necessarily charges a fighting by two or more persons in a public place.

*Bullock*, for the defendant, cited 5 Yerg. 356.

GREEN, J. delivered the opinion of the court.

The indictment in this case charges, that the defendants "did make an affray," without alleging the *facts* which constitute an affray.

It is insisted, that as an affray can only be made, by two or more fighting together in a public place, the charge, that the parties "made an affray," includes necessarily, a charge, that they fought together in a public place. But this is no answer to the objection. The word "affray" is the technical designation of the crime constituted by the facts of two or more per-

[Ridgeway et als. vs. Ward.]

sons fighting together in a public place,—and these facts, not the legal conclusions from them,—must be charged in the indictment. Upon this point, the case of *Simpson vs. The State*, 5 Yerg. R. 356, is conclusive authority.

Let the judgment be affirmed.

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RIDGEWAY et als. vs. WARD.

Clerical errors may be corrected by the court at a subsequent term, but cannot be corrected from the memory of the Judge, or from written evidence filed in the cause. They can only be corrected by proceedings of record.

Ward gave notice to Ridgeway, a Constable, and his sureties, that he would move against them for judgment, before a Justice for the failure of Ridgeway to return executions. Two judgments were rendered by the Justice against Ridgeway and the sureties. They appealed to the Circuit Court of Weakly county.

At the June term, 1843, the two judgments of the Justice of the Peace were consolidated by consent, and a judgment for the whole amount entered up, and an affirmance of the “judgment” of the Justice, but no judgment was entered against the sureties.

At the February term, 1844, the plaintiff, Ward, moved the court, (Harris, Judge, presiding,) to correct the judgment, so as to embrace the sureties. And in support of his motion, he introduced the Justice’s docket, which showed that the judgment was rendered against the sureties; the notice showing that they were notified of the motion, and the appeal bond showing that they appealed, and the docket of the court, at the previous term, showing that there was a general affirmance of the judgment. The Judge being of the opinion that reference might be made to these written evidences, ordered the entry of a judgment against the sureties *nunc pro tunc*, which was accordingly done. They appealed.



[Ridgeway et al. vs. Ward.]

*Gibbs and Cardwell*, for the plaintiff in error.

*James Dunlap*, for the defendant in error.

GREEN, J. delivered the opinion of the court.

In this case Ward had obtained two judgments, by motion, against Ridgeway, as a Constable, and against the other defendants as his sureties. In these cases an appeal was taken to the Circuit Court, where the two cases against Ridgeway and his sureties are lost sight of, and an entry is made under the caption of "*Willis Ward vs. Richard Ridgeway*," as follows: Appeal from the Justice of the Peace. "This day came the parties by their Attornies; and, thereupon, by consent of parties, the judgment of the Justice is affirmed. It is, therefore, considered by the court, that the plaintiff recover of the defendant the sum of \$242 42, the judgment of the Justice aforesaid, together with costs in this behalf expended; and by consent the judgment is stayed until the 1st of January next, 1844."

This judgment was rendered at the June term, 1843. At February term, 1844, a motion was made to amend the judgment, by entering up a judgment against the sureties of Ridgeway, the Constable. This motion was sustained by the court, and a judgment against the sureties was rendered for the sum that, at June term, 1843, had been, by consent, entered against Ridgeway.

This action of the court, at February term, 1844, it is said, can be sustained on the ground, that the names of the sureties were omitted by mistake in the entry of the judgment at June term, 1843, and that it amounts to the correction only of a clerical mistake, which under the authority of the case of *Faris vs. Kilpatrick*, and *Crutchfield vs. Stewart*, 1 Hump. Rep. 379, 380, the court had the power to make. In the case of *Faris vs. Kilpatrick*, the judgment entered here, affirmed in all things the judgment of the Circuit Court; but in stating the amount so recovered, the Clerk, by mistake, omitted the sum of \$48 00, the damages given in the Circuit Court upon the affirmance of

[Ridgeway et al. vs. Ward.]

the judgment of the County Court. This was a plain case of clerical mistake. The judgment was affirmed, and the only question was, what was the judgment then affirmed?

This was rendered certain by an inspection of the record from the Circuit Court. In the present case the Circuit Court did not have before it the entry showing the Justice's judgment. The notice and the appeal bond were the only proceedings on file. The Constable's bond was not a part of the record, it was filed as evidence only.

Now, when it is stated in an entry of Ward *vs.* Ridgeway only, that the Justice's judgment was affirmed by consent, and, then, instead of entering up two judgments, as the Justice had done, one judgment is entered for the whole sum. How does it appear, that this confessed judgment was agreed to be rendered against the whole of the parties that were before the Justice? The judgment is very different from that which the Justice had pronounced in either case; it is not, therefore, an affirmance of the Justice's judgment; but it is a different one altogether, and was confessed by Ridgeway.

We cannot know from the proceedings, which were before the Circuit Court, that this judgment was not purposely restricted to the Constable alone, on condition, that all objections to the proceedings before the Justice should be waived, and judgment by consent should be taken against him.

We do not think this case is supported by either of the cases cited; and, therefore, the judgment entered at February term, 1844, against the sureties of Ridgeway, must be reversed.

**TAYLOR'S lessee vs. COZART.**

A levy was in these words: "Levied on three tracts of land, one containing 300 acres, another 50 acres, and another containing 110 acres, all in the county of Carroll, the property of H. Cozart: See advertisement in the newspapers for description:" Held, that it was void for uncertainty. A reference for description to newspaper advertisements will not do, as they constitute no part of the record of the case.

Ejectment by Taylor against Cozart for 110 acres of land, in Carroll county. It was tried by Judge Totten and a jury of Carroll, at the January term, 1844. Taylor introduced a record of a judgment by Taylor against Cozart, in the District Court of the United States, at Jackson, and a Marshal's deed. The levy was in the following words:

"Levied this execution on three tracts of land, one tract containing 300 acres, one containing 30 or 40 acres, one other containing 110 acres, as the property of Haywood Cozart, all in the county of Carroll. See advertisement in newspapers for description. 25th January, 1841.

ROBT. I. CHESTER, M. W. T."

The plaintiff then offered as evidence newspapers of the date of the levy, containing specific descriptions of the land sued for; together with proof to connect the levy and the advertisements, &c. This was rejected as inadmissible. The court then charged the jury, that the levy was void, and conveyed no title. A verdict was rendered for defendant. Plaintiff appealed.

*Pavatt*, for plaintiff.

*Bullock and Burrow*, for defendant.

GREEN, J. delivered the opinion of the court.

This is an action of ejectment. The plaintiff claims title by means of a sale by the Marshal, made by virtue of an execution against Haywood Cozart and others. The levy is in the following words:

"Levied this execution on three tracts of land; one tract containing 300 acres; one tract 40 or 50 acres; one other tract con-

[Taylor's lessee vs. Cozart.]

taining 110 acres, as the property of Haywood Cozart, all in the county of Carroll. See advertisement in newspapers for description. 25th January, 1841.

ROBT. I. CHESTER, M. W. D."

This levy is too vague and uncertain to afford any information by which to identify the land. It could not authorize a sale, and the deed of the Marshal conferred no title on the purchaser. See the cases of *Pound vs. Pullin*, 3 Yerg. 388; *Brown vs. Dickson*, 2 Hump. Rep. 395, and *Huddleston vs. Garratt*, 3 Hump. 629.

But it is said, the reference in this levy to an advertisement in the newspaper, takes this case out of the operation of the rule established in the cases above referred to. We do not think this reference helps the levy in the least degree. It does not appear what advertisement is referred to. Whether the one the Marshal intended himself to publish in this case, or some other advertisement about the same land. And hence no assistance can be gained from that reference. But if the reference to an advertisement had been as specific as it could have been made, it would not be sufficient. The advertisement forms no part of the record; exists only in the evanescent publications of the day, and must soon be lost to the memory of man, and become incapable of proof. Had reference been made to a deed of record, or to facts on the ground, capable of proof, the case would have been wholly different.

Affirm the judgment.

**CHESTER vs. WOOD & COLE.**

1. Where a person applied for an extension-entry, the production of his grant or deed for less than two hundred acres of land, is sufficient *prima facie* proof, that he did not own more. Those who assert, that he owns more, must prove it, if they wish to defeat his application.
2. Where a party applied for an extension-entry, and it was refused by the entrytaker, on the ground, that the land had been once appropriated by warrant, and it did not appear that it had ever been vacated: Held, that the absence of proof of the fact would not defeat the application. The right to appropriate it depends on the fact, that the land was vacant at the time.

This petition for a *mandamus* to the entry-taker was heard before Read, Judge, on petition, answer, replication and proof. The petition was dismissed, and plaintiff appealed.

*Totten and McLanahan*, for Chester.

*Huntsman and Scurlock*, for defendants.

TURLEY, J. delivered the opinion of the court.

These cases present a question of controversy between Robert I. Chester and John W. Cole, as to the right to appropriate sixty acres of vacant land in the county of Madison. It appears, that the land had been entered by warrant in 1820; but that the entry was vacated by a removal of the warrant subsequently, and a location of it elsewhere.

On the 22d day of January, 1838, Cole filed in the entry taker's office, a location for the land under the provisions of the act of 1837, ch. 1, which was filed by Carrington the entry taker, but not spread by him upon the general plan.

On the 26th of October, 1838, Chester tendered an entry upon a warrant for the same land, which was refused by the entry-taker, and thereupon he filed his petition for a *mandamus*, to compel him to receive it; which upon hearing, was refused by the court.

The question is, which has the right to the land, Cole or Chester? Cole claims it by the right of extension, under the act of 1837, as the owner, by deed, of a small tract of land adjoining the sixty acres of vacant land in controversy; this right is denied by Chester.

[Chester vs. Wood & Cole.]

The 2d section of the act provides, that "any person who, at the passage of the act, (viz: the 11th day of November, 1837,) was the owner by entry, grant, or deed of conveyance, of a small tract of land, of a less quantity than two hundred acres may enlarge the same to any quantity not exceeding two hundred acres."

At the passage of the act, Cole was the owner by deed of the small tract adjoining this vacant land, as appears by his deed therefor, filed as evidence of the fact, and which we hold to be sufficient; he tendered his entry of extension, which the entry-taker, Carrington, says he did not receive, because the land appeared to have been appropriated by warrant in 1820; and that he had no evidence that the entry had been vacated. The entry in point of fact had been vacated: the land was vacant, and Cole had the legal right to appropriate the same under the act of 1837. But it is now argued, that though the entry had been vacated, yet Cole was not in possession of the proof of the fact, and that this was afterwards procured by Chester, and that he, and not Cole, is entitled to the benefit thereof. We do not think so. Cole's right to make the extension rested upon the fact of vacancy, and not upon his knowledge of the proof thereof. The land being vacant, it was the duty of the entry-taker to have received his entry and spread it upon the general plan. And his not having done so, has not deprived Cole of his right, and substituted Chester in his stead. The fact that Cole is not the owner of two hundred acres of land, is sufficiently proven by the production of his deed for a less amount. That he is not the owner of more is a fact, from its nature incapable of being proved by him. If he be, it is easily susceptible of proof, by those who assert it; which must be made to exclude him from the benefit extended to him by the act of 1837.

We, therefore, affirm the judgment of the Circuit Court, dismissing Chester's petition, and direct a peremptory *mandamus* to the entry-taker, to receive and spread upon the general plan the entry of Cole.

## GILLESPIE vs. WOOD &amp; DOUGLASS.

1. The office of a writ of *mandamus* is to enforce the performance of official duty, and the officer cannot be commanded to do that which it was not lawful for him to do without such command.
2. Horn secured, in his own name, an occupancy according to law, under a contract with Rudisil, that such occupancy, when secured, should be transferred to Rudisil. Horn sold and transferred it to Douglass, and Douglass entered the land by warrant. Held, that the legal right was in Douglass; and that if Rudisil had an equitable right to appropriate the land, that right could only be established and enforced in a court of chancery, and not by *mandamus*.

Gillespie filed this petition for a *mandamus* in the Circuit Court of Madison county, for the purpose of compelling Wood, the entry taker of said county, to receive a location and make an entry of 140 acres of land lying in Madison county. Wood, the entry taker, refused to receive the location, on the ground that the land had been previously appropriated by Douglass. It appeared, that one Houston had been in possession of the land and had made some small improvement thereupon; that Rudisil had purchased Houston's interest, and had made an agreement with Horn, that Horn should take possession of, secure the occupancy according to law in the name of Horn, and transfer it to Rudisil. The occupancy was accordingly secured in Horn's name; and Horn thereupon, for the sum of ten dollars, sold and transferred the claim and possession to Douglass, and Douglass made an entry of the land by warrant. Rudisil sold his claim to Gillespie. The petitioner Gillespie bought his right to enter the land on the contract of Rudisil and Horn, and alleged a fraudulent combination to defeat the claim of Rudisil, whose assignee he was. The petition prayed that the entry of Douglass be declared void, and that peremptory *mandamus* issue, &c.

At the April term, 1843, the case came on to be heard, on petition, answer and proof. Read, the presiding Judge, dismissed the petition.

The petitioner appealed.

*McLanahan* and *McLellan*, for petitioner.

*Huntsman* and *Scurlock*, for defendants.

[Gillespie vs. Wood &amp; Douglass]

GREEN, J. delivered the opinion of the court.

This is a petition for a *mandamus*, to compel the entry taker of Madison to receive an entry tendered by the relator. The petition alleges, that the relator has a right of occupancy to the land embraced in the entry tendered by him; that the defendant Douglass has entered the same, but that his entry is void and ought not to have been received by the entry taker.

From the proof, it appears that in 1826 one Horn settled upon the land in dispute, under a contract with one Rudisil to make an occupant settlement and transfer the same to Rudisil. The relator Gillespie claims under Rudisil. Horn made the improvements, and became entitled to enter the land as an occupant; but he has never made a transfer of his claim to Rudisil or to the relator. Douglass, the defendant, purchased Horn's claim for some small consideration, and tendered an entry for the land, which was received and recorded by the entry taker. Afterwards, the relator tendered his entry for the same land, but the entry taker refused to receive it, because the land had been previously entered by Douglass.

From this statement of the facts, it is manifest that there was no legal impediment in the way of Douglass's entry. Whether the contract between himself and Horn was a fraud upon the rights of the relator, is not now a matter open to enquiry. The only question is, whether his entry is valid; and as it has unquestionably appropriated the land, no other entry can be legally made. The entry taker has no power by virtue of his office, to make void a valid entry without the consent of the enterer. And this court cannot command him by *mandamus* to do that which, without such command, it would not have been lawful for him to do. The office of a *mandamus* is to enforce the performance of an official duty; and we cannot in this case institute an enquiry into the equities of these parties, and give the relief which a court of chancery might afford. That relief must be sought in another forum, and in another form of proceeding.

Let the judgment be affirmed.



## COLLINS vs. OLIVER.

1. A Justice of the Peace has no jurisdiction to render a judgment on an award which exceeds fifty dollars.
2. A penal bond for \$100 being dischargeable, by the act of 1801, ch. 6, sec. 66, by the payment of damages, to be assessed by a jury, and costs of suit, is not embraced by the act of 1835, ch. 17, giving a Justice of the Peace jurisdiction to the extent of \$100 over all debts and demands evidenced by specialty, note, agreement or account, signed by the party to be charged, &c.

Oliver and Collins having matters in controversy, agreed to submit them to Caviness, West, Phillips and Easton, and any others they might select. The parties signed a bond, each to the other, for the sum of \$100, to be void on condition they should abide by and perform the award. Smith, Phillips and Caviness sat and heard the proofs of the parties, and awarded the sum of fifty-seven dollars and forty-five cents to Oliver. Collins having failed to pay this sum, Oliver sued Collins by warrant "on a plea of debt under \$100 due by award of arbitrators." The Justice rendered a judgment in favor of Oliver for the amount of the award. Collins appealed to the Circuit Court of Henderson county, where, at the November term, 1842, Read, Judge, presiding, a verdict and judgment were rendered for Oliver, from which Collins appealed.

*Bullock*, for Collins, plaintiff in error.

*McLanahan*, for Oliver.

TURLEY, J. delivered the opinion of the court.

This is an action upon an award for the sum of fifty-seven dollars, forty cents, commenced by warrant before a Justice of the Peace; and the question presented for consideration is, whether that tribunal has jurisdiction of the subject matter of controversy.

It appears, that the arbitrators to whom the matter in dispute was referred by the plaintiff and defendant in error, awarded that the plaintiff was indebted to the defendant in the sum of fifty-seven dollars and forty-five cents and costs.

[Collins vs. Oliver.]

The jurisdiction of a Justice being given by statute, is necessarily limited to the cases provided for, and cannot be extended by implication.

The act of 1835, ch. 17, provides, that Justices of the Peace shall have and exercise jurisdiction over all debts and demands due on any specialty, note or agreement, signed by the party to be charged therewith, on which the judgment will not sound in damages, and over all settled accounts, signed by the parties, when the amount claimed to be due on such specialty, note, agreement or account does not exceed one hundred dollars; and over all sums not exceeding fifty dollars, which may be due by open account, whether for wares, goods and merchandise sold and delivered, work and labor done, or for specific articles, or by contract in writing signed by the party to be charged therewith, on which the judgment would sound in damages, whether due by obligation, note or assumpsit.

The amount sued for in this case being over fifty dollars, the question is, whether the statute includes it, and we are of opinion that it does not; for although an award does not sound in damages, and an action of debt is the proper remedy thereon, yet the amount given by it is not due by a specialty, note or agreement signed by the party to be charged, nor by a settled account signed by the parties, and by the express wording of the statute this jurisdiction is restricted to this class of cases.

It has been argued, that the award having been reduced to writing and signed by the arbitrators, it is to be considered as a settled account signed by the parties, the arbitrators being their agents for that purpose. We do not think so. An arbitrator is not an agent; he is not acting for and in the stead of the party selecting him, whose interest it is his bounden duty to protect, but as a person vested with power by the law to examine and determine the matters in controversy, which have been submitted to him, and whose imperative duty it is to do equal justice to the parties disputant; his duties are more of a judicial than a fiduciary character, and his determination partakes more of the nature of a judgment against, than a contract on the part of the person to be charged; and therefore, where the award has been made in good faith, and in accordance to

[Collins vs. Oliver.]

the forms required, it is binding and conclusive upon the parties; and it has to be sued upon only, because an arbitrator is not vested with power to enforce his decrees by execution, which is the end of the law.

But it is further argued, that as the parties to this award bound themselves by bond in a penalty of one hundred dollars to abide by and perform the award, that this suit may be maintained upon the bond, it being a specialty signed by the party to be charged. It is true that it is a specialty and signed by the party, and thus far complies with the requirements of the statute, but more than this is required to give the Justice jurisdiction. The action to be brought upon it must not sound in damages, which an action upon this bond must, whether it be debt or covenant. It is a specialty, not for the absolute and unconditional payment of one hundred dollars, but for a penalty of one hundred dollars, void upon condition that the party against whom the award may be made shall abide by and perform it. The judgment, then, in an action upon it, is for the amount of the penalty, to be discharged by the payment of the damages sustained by a breach of the covenant, which, although it cannot be for more than the penalty, may be for less: for the act of 1801, ch. 6, sec. 66, provides, than in all actions of debt, which shall be brought upon any bond or bonds for the payment of money, or upon bonds with collateral conditions, wherein the plaintiff shall recover, judgment shall be given for the penalty of the bond, to be discharged by the payment of the principal and the interest thereon, or the damages assessed by a jury and the costs of suit. Then, before judgment could be given upon this bond, the amount of damages sustained by its breach must be assessed, which to the extent here given can only be done by a jury.

The judgment of the Circuit Court, sustaining the justice, is erroneous, and must be reversed and arrested.

## THE STATE vs. JOHN PYBASS.

An accessory cannot be put on his trial before the conviction of the principal, unless he consent thereto, or be put on his trial with the principal. This principle of the common law applies to the offence created in the 12th section of the act of 1829, ch. 21.

The grand jury of Henderson county, at the July term, 1842, returned a bill of indictment against Newton Pybass, which charged that he (said Pybass,) on the 25th day of March, 1841, with force and arms, in the county of Henderson, feloniously, wilfully, unlawfully and maliciously, did set fire to the house of one Stacy Roach, there situated, with the intent, then and there, thereby to injure said Stacy Roach, against the statute, &c. and that John Pybass, before the felony aforesaid was committed in form aforesaid, to wit, on the 25th day of March, 1841, in the county aforesaid, did, maliciously, wilfully, unlawfully and feloniously, incite, move, procure, counsel and command the said N. Pybass the felony aforesaid, in manner and form aforesaid to do and commit, &c.

The defendant moved the court to quash the bill of indictment. This motion was overruled. The defendant thereupon pleaded not guilty, and continued the case. At the November term succeeding, the defendant again continued the case. At the March term, 1843, the defendant again continued the case. At the July term, 1843, when the cause was called, the defendant objected to being put on his trial until the principal should be tried; and the court, not being satisfied as to the law arising, continued the cause, upon advisement, till the next term of the court. At the November term, 1843, Dunlap, Judge, presiding, this motion was overruled, and thereupon the defendant ordered to be put upon his trial. The defendant then continued the cause. At the March term, 1844, Read, Judge, presiding, the defendant again objected to being put on his trial; and the matters of law thereupon arising having been argued, the presiding Judge sustained the objection. The court thereupon ordered that defendant be discharged; the judgment of discharge reciting, that no steps had been taken to bring said Newton Pybass to trial, and the attorney general declining to

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take any steps for that purpose, and that the said N. Pybass had fled to parts unknown.

From this judgment, the State, by the attorney general, Talbot, appealed in error.

*Attorney General*, for the State.

*Bullock and McLanahan*, for the defendant.

REXSE, J. delivered the opinion of the court.

The defendant is indicted as accessory, before the fact, of James M. Tatum and Newton Pybass, for the burning of a building called Mount Pleasant Meeting House, under the 12th section of the Penitentiary Code. The form of the indictment is according to the mode of proceeding at common law in the prosecution of an accessory. After the cause had been pending for a considerable time in the Circuit Court, the defendant moved that he should not be put upon his trial, before the trial and conviction of the principals, or of one of them indicted with him. This motion was sustained, and the court ordered his discharge, and from this the State has prosecuted an appeal in error to this court. The general question involved in this case was fully discussed and conclusively determined at the last Nashville term, in the case of *Whitehead* against the State, to which, and to the authorities upon which that judgment was based, we refer. But it is argued, on behalf of the State, that the offence charged in this indictment was at common law a misdemeanor only; that the felony is created by the statute, and that the terms of the statute constitute the charge against the defendant a distinct and substantive felony. If this were so, still the defendant is indicted as an accessory according to the forms of the common law, and not for a distinct and substantive felony. But it is not so. The offence as created by the statute is in its nature accessorial only, and the term used to create it, "procure," is appropriate to designate, according to law, the accessory. The proposition is maintainable neither by reason or by authority, that when the offence has been at common

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law a misdemeanor, and has been by statute created a felony, and the relation of accessory has also been constituted, that the accessory may, without his consent, be put on trial with or before his principal. Every reason which exists for the trial and conviction of the principal in a common law felony before the accessory should be put upon his trial, applies with equal force to the case of principal and accessory in a statutory felony. To give the government the right, in either case, to put the accessory upon his trial without his consent, with or before his principal, the legislature must interpose and expressly change the rule of the common law. The Circuit Judge, therefore, was right in refusing to order the defendant to be put on his trial in this case. As to the propriety of ordering his discharge, we have some doubt; but as it was done in the exercise of a legal discretion properly and necessarily confided to the Circuit Judge, we do not feel called upon by the circumstances of this case, as shown upon the record, to determine that such discretion was exercised contrary to law.

Let the judgment be affirmed.

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COONEY vs. WADE.

A constable who receives a note and executes his receipt for the collection of it, has the power to sue out a warrant, prosecute the suit to judgment, take out execution, receive the money and execute a binding and valid receipt to the defendant in the execution; but he cannot, by virtue of his agency, or as an officer, receive any thing from the defendant but money, and if he do, it is not a discharge of the execution.

Cooney recovered a judgment against Wade before a Justice of the Peace in Gibson county, on the 28th day of February, 1839. A *fi. fa.* was issued on the 7th day of July, 1842, for sixty-three dollars and seventy-nine cents. Wade presented a petition to Harris, Judge, alleging, 1st, that no *fi. fa.* had issued on the judgment within twelve months and a day from the rendition of the judgment; and, 2d, that the judgment had been discharged; and praying a writ of *superedeas*, to the end that the

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case be brought up to the Circuit Court and the *fi. fa.* quashed. The writ was ordered and was issued. At the March term, 1844, Harris, Judge, presiding, a motion was made to quash the execution, and a jury was ordered to come and ascertain by their verdict whether the said judgment had been paid.

It appeared, that McBride, a constable, had charged himself with the collection of the claim which Cooney held against Wade, by the execution of a receipt, on the 25th July, 1839, in which he promised to collect or return the note; that Wade placed notes in the hands of McBride for collection, with a promise that he would collect them and appropriate the money to the satisfaction of the judgment of Cooney against Wade. McBride collected the money on Wade's claim and appropriated it to his own purposes. After McBride went out of office and after the appropriation of the money collected, he gave Wade receipts for so much money, in discharge of Cooney's judgment.

The Judge charged the jury, that the constable, neither by virtue of his office, or the agency with which he was invested by the undertaking to collect the money, was authorized to take notes in discharge of the *fi. fa.* or any thing but money, and that the *fi. fa.* was not discharged unless the money, when collected, was applied to the satisfaction of Cooney's judgment.

The jury returned a verdict, that the defendant had not paid the debt, and the court awarded a *procedendo*.

The defendant appealed.

Totten, for Wade.

Fitzgerald and J. G. Harris, for Cooney.

GREEN, J. delivered the opinion of the court.

In this case, it appears that Cooney placed a note on Wade in the hands of McBride, a constable, for collection. Wade was sued, and a judgment obtained. He then placed several

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notes in the hands of McBride, the constable, to be by him collected and applied to the satisfaction of Cooney's debt.

These notes were collected by McBride, and the money was used by him.

After the money was so used, and after he went out of the office of constable, McBride executed to Wade receipts for the sums so collected and used by him, as so much money paid in discharge of Cooney's judgment.

Cooney having received no part of his money, caused an execution to be issued against Wade, who applied for a *superseas* and brought the cause into the Circuit Court.

The court was of opinion, that the reception of Wade's money by McBride did not constitute a payment to Cooney, and that McBride had no power to discharge Wade's liability by the receipt he gave him for the money he had collected and used. Wade appealed to this court.

We think there is no error in the record. It is true, that McBride was Cooney's agent, and had a right, as such, as well as by his office of constable, to receive his money and give Wade an acquittance therefor; but he had no power to receive payment in any thing but money.

In taking the notes from Wade, they did not become the property of Cooney. McBride had no power to make them such, by any contract with Wade; nor indeed did he assume to do so. He undertook, as Wade's agent, to collect the notes, and apply the money to Cooney's debt. Until collected and so applied, the notes and the money that was received upon them belonged to McBride. But while it was in McBride's hands, as Wade's money, it was used by him. When he executed the receipts, no money was paid, nor did he have any in his hands belonging to Wade. He was Wade's debtor to the amount of money he had used; and this debt, it was agreed, should be regarded as money in his hands for Cooney. This, McBride had no right to do. He had no power to discharge Cooney's debt by assuming the debt himself; and this was in effect the transaction.

Let the judgment be affirmed.



**RAINEY & HENDERSON vs. SANDERS.**

1. When the defendant applies to amend his pleadings, the amended plea must be offered; if it be not, it is in the discretion of the court to refuse the application.
2. When the court sustains a demurrer to a plea in abatement, the defendant has the right to plead over, and a final judgment is erroneous.

This action of debt was tried at the May term, 1843, of the Circuit Court of Madison county, before Judge Read, and judgment rendered in favor of the plaintiff, from which the defendants appealed in error.

*McLellan*, for plaintiffs in error.

*Haskell*, for defendant.

GREEN, J. delivered the opinion of the court.

Sanders sued Rainey & Henderson in a plea of debt. The summons concludes: "Witness, Adam Guthrie, clerk of our said court, at office, the fourth Monday in                      , 184    , and sixty year of American independence."

The defendant pleaded in abatement, that the test of the writ was omitted in the summons; but this plea being informal, after it was filed, and before issue was taken or demurrer filed, they moved the court for leave to amend their plea, which was refused. The plaintiff then demurred to the plea, which demurrer was sustained by the court, and a final judgment was entered upon the minutes of the court against the defendants.

The bill of exceptions shows, that "after the demurrer was sustained by the court, the plaintiff's counsel proceeded to take judgment by default for the want of a plea, read his declaration and proposed to read a note, which was objected to by the counsel for the defendants on the ground that there was a variance between the writ and declaration, and between the note and declaration, but the court overruled the objection."

1. The first question is, whether the court erred in refusing to permit the defendants to amend their plea.

[*Rainey & Henderson vs. Sanders.*]

We think that if the amended plea had been offered and had constituted a good defence to the action, the court should have permitted it to be filed. But this was not done. The court was asked generally for leave to amend, without any amendment being presented, so that it might be seen whether it was proper it should be allowed. This being the case, it was in the discretion of the court to refuse the application.

2. The court entered up a judgment final, when the demurrer was sustained, and this was erroneous. On sustaining the demurrer to the plea in abatement, the defendants should have been permitted to plead over. This was in fact the course that was pursued in the disposition of the cause, as is shown by the bill of exceptions. It is there stated, that after the demurrer was sustained, the counsel proceeded to take judgment for want of a plea.

But the court, instead of entering up the judgment as moved for by the plaintiff, and as it should have been, erroneously entered a judgment final upon the demurrer. This judgment must be reversed; and this court, proceeding to render such judgment as the Circuit Court should have given, orders, that judgment for the debt in the declaration mentioned be rendered against the defendants, they having failed to appear and plead, but made default.

HARVEY & CLAXTON *vs.* SWEASY.

1. A joint promissor in a note is not a competent witness to prove in an action against the others, that they signed the note or authorized another to sign it in their names.
2. An agent is competent to prove his own agency.
3. Where the plaintiff gave a joint promissor in a note a release to render him competent; held, that the joint promissor was not competent to prove the existence of such release; much less its legal effect—it should have been produced.
4. Where there are joint promissors, a release of one to effect the discharge of the others must be a release under the seal of the party, and must be pleaded by the party wishing to discharge himself by such act of the plaintiff.

Debt, in the Circuit Court of Gibson, by Sweasy against Harvey & Claxton, on a note, to which there was a verified plea of *nil debet*, and issue was taken thereon. It was tried before Harris, Judge, and a jury of Gibson, at the November term, 1841, and a verdict was returned in favor of the defendants, and a motion for a new trial was made and overruled, and judgment rendered, from which the plaintiff appealed in error.

All the facts are stated in the opinion of the court.

*I. B. Williams*, for plaintiff. Coke Litt. 232; Hob. 66; 2 Saund. 48; 7 John. 208; 2 John. 449; 9 Cow. 37; 9 Wend. 336; 13 John. 87; 1 Phillips, 52.

*Totten*, for defendant. 8 Cow. 60, 7 John. 208; Chitty on Con. 296, 293; *Bell vs. Steel*, 2 Hum. 148, 2 Thomas's Coke, 453, margin and note c; 11 Vir. Abr. 398; Bos. & Pul. 630.

REESB, J. delivered the opinion of the court.

Richard Sweasy sued Harvey & Claxton, to recover the amount of a promissory note signed by the firm name and style, by John Swain as their agent, and also signed by John Swain as a joint promissor. The defendants pleaded on oath *nil debet*, upon which there was issue. On the trial, Swain was offered as a witness to prove the making of the note, and his authority as agent. The defendants objecting to his competency, on the ground that he was a joint maker of the note, and had therefore an interest in fixing the liability of the defendants,

[Harvey & Claxton vs Sweasy.]

he was examined on his *voir dire*, and stated that the plaintiff had given a written release of all liability on said note, and that he was wholly discharged therefrom by said release, which he then had in his possession, but had not brought with him to court. The defendant objected to this mode of establishing the fact and the effect of a written release, and insisted that it must be produced and proved, and then be submitted to the inspection and judgment of the court as to its legal operation, before the incompetency of the witness could be removed by said supposed instrument. But the court overruled this objection, and the witness was sworn and examined in chief.

And the first question is, whether the court erred in permitting to be set up, and in giving effect to the instrument in question in the mode adopted. And we think it very clear that the court did err. The instrument was in existence, as the witness alleged, and within his control, and actual, but not manual possession. Its existence, then, should have been shown by its production in court, and its legal effect declared by the judgment of the court. But the witness was not only trusted to prove its existence, but to construe it, and establish its legal operation. For he says it was a release discharging from liability. But however erroneous this mode of proving and giving effect to the release may have been, still if the witness was competent without a release, the error will be immaterial; and the main question is, whether the witness was competent without any release. And we are of opinion that he was not competent; but not upon the ground that an agent cannot prove his own agency, because if such agency did not exist, he could in some mode be made liable to the plaintiff. For it has been long and well settled, upon grounds of policy and necessity, that an agent, notwithstanding such interest, may prove what he did, and his authority for doing it. But the incompetency in this case arises from his being a joint promissor. The character and operation of the interest arising from that ground of relation as it affects the question of competency, would be one not without its difficulties, if it had presented itself for the first time. But the question is identical in principle with that of the question as to whether one partner can be heard

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to prove the existence of a partnership. This question has been elaborately discussed and conclusively settled in the case of *Vanzant vs. Kay*, and *Foster vs. Eaton* and in other cases.

The *vinculum* of the joint promise in such a case as this, places the joint promissor in the same category of interest, *pro hac vice*, with the partner called to prove the contract of partnership; and the same rule as to the competency must be applied.

Other questions have been discussed in this case. It is insisted by the defendants below, that the plaintiff having got before the court in his own mode, the fact of a release to Swain the joint promissor, the legal effect of such release was to discharge the liability of the defendants, and that the Circuit Court ought so to have instructed the jury. To this, there are two objections: 1st, Nothing but a technical release under the seal of the party could have that effect; and, secondly, if there had been such a release, it must have been pleaded by plea, since the last continuance, unless the release existed, and that was shown before the time the plea of *nil debet* was filed.

The judgment, however, will be reversed, for the reasons in this opinion set forth, and the case be remanded for a new trial therein.

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#### DEGRAFFENREID vs. SCRUGGS.

A cotton gin erected in a house and attached to the house by nails and braces, is a part of the freehold, and passes by the deed of vendor.

Scruggs sued Degraffenreid in trover, in the Circuit Court of Fayette, to recover the value of a cotton gin. Plea, not guilty, and issue.

It came on to be tried at the December term, 1843, Dunlap, Judge, presiding.

It appeared, that Shelton was the owner of 700 acres of land lying in Fayette county, a cotton farm; that for the purpose of ginning the cotton made thereupon, he had erected a cotton gin; that the house was built upon blocks, and the gin fastened

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to the house by nails and braces. Shelton conveyed the 700 acres, with hereditaments and appurtenances, by deed in trust to Nelson, to secure the payment of certain debts. This deed was made on the 27th day of April, 1842. On the 22d day of December, 1842, Shelton sold and conveyed the cotton gin to Scruggs in trust for the benefit of other creditors. On the 26th day of January, 1843, Nelson sold the land and appurtenances at public auction to Degraffenreid, and conveyed the same to him.

Scruggs demanded the cotton gin of Degraffenreid, which he refused to deliver.

The Judge charged the jury, that if the gin could be delivered and removed without serious injury to the land or gin, it could not pass under the deed to Nelson; but if, on the contrary, the gin could not be severed and removed from the premises without injury to the land or gin, they would find for the defendant.

The jury returned a verdict in favor of the plaintiff for \$121. A motion for a new trial was made and overruled, and judgment rendered, from which the defendant appealed in error.

*Searcy*, for plaintiff in error. Questions respecting the right to fixtures arise principally between three classes of persons.

1st. Between the executor and the heir; and here the rule is more rigorous in favor of the inheritance and against the right to consider as personal chattels any thing which has been affixed to the freehold.

2d. Between the executor of tenants for life and the remainderman or reversioner. Here the right to fixtures is considered more favorable.

3d. Between landlord and tenant, and here the greatest latitude and indulgence is given to the tenant.

See 3d edition of Kent, 2 vol, M page 345; 5th Am. ed. 2 Starkie, T page 908, note s.

The strict rule as to fixtures that applies between executor and heir, applies equally as between vendor and vendee. 3d ed. of Kent, 2 vol. top page 345; *Holmes vs. Temple*, 20 John. R. 30; 6 Conn. R. 665; 3 Mason's R. 450; 6 Greenleaf R. 154.

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And so the mortgagee; 1 Ashe's R. 175; 15 Mass. 169; 3d ed of Kent, 2 vol. page 345, note.

In the case of *Elwes vs. Man*, 3 East's R. 38, all the English cases are reviewed by the court; and there the distinction is taken, and shown by the court to run through all the cases reviewed, between annexations to the freehold for the purposes of trade and manufactories, and those for agriculture: and the right of the tenant to remove was strong in the one case and not in the other. It was held, that an agricultural tenant who had erected fixtures for the convenient occupation of his farm, was not entitled to remove them. When the erections had been for the benefit of trade or manufactures, the right to remove would have been undoubted; and this was a case between landlord and tenant, where the greatest relaxation is given to the rule.

The old rule, that whatever was annexed to the freehold could never again be removed without the consent of the owner of the inheritance, was relaxed solely for the benefit of trade and manufactures; and in course of time, as between landlord and tenant, it was further relaxed; and matters merely ornamental and of domestic convenience, were excepted.

These are only exceptions to the general rule; and in the case of *Buchland vs. Butterfield*, 6 E. C. L. R. 17, the court says, that being exceptions only, they ought to be fairly considered, but not extended.

These exceptions have not been extended by the American cases. The case of *Van Ness vs. Picard*, in 2 Peters's R. 137, was placed on the ground that the fixtures were erected for the purpose of trade. And the case of *Holmes vs. Temple*, 20 John. R. 29, where a tenant was allowed to remove a cider mill, was decided on the same principle that governed Lord Ch. B. Comyn, who held that a tenant could remove a cider mill, because it was a mixed case between enjoying the profits of the land, and carrying on a species of trade, considering a cider mill properly as accessory to the trade of making cider.

All these causes are between landlord and tenant, where the greatest latitude and indulgence is given to the tenant.

The case now before the court, is between vendor and vendee, where the rule obtains in its greatest rigor; and in such

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cases the exceptions to the old rule are founded upon this distinction: "That where the fixtures are accessory to a matter of a personal nature, they are considered as personal and may be removed. But when accessory to the freehold, they are considered as part of the freehold and cannot be removed." And so in the case of *Lawton vs. Lawton*, 3 Atk. 13, a case between executor of tenant for life and remainderman, of a fire engine to work a colliery, was considered an accessory to the carrying on the trade of getting and vending coal, a matter of personal nature. Upon the same principle the cider mill was held to be a movable chattel in the case decided by Comyn, above referred to. In the case of *Lawton vs. Salmon*, 1 H. Bla. R. 259, between executor and heir, for the removal of salt pans, Lord Mansfield says: "The salt spring is a valuable inheritance; but no profit arises from it unless there be a salt work, which consists of buildings, &c. for the purpose of containing the pans, &c. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal."

Apply this principle to the case now before the court: to what chattel interest, or what matter of a personal nature is this gin accessory? We contend that it is accessory to the freehold, absolutely necessary to the enjoyment of the land. Without it, the product of the land would be of no value. In the case of the cider mill, the fixture was for the purpose of changing the product of the land. In this case, the fixture is not for the purpose of changing the product, but preparing it for market.

No person appeared for the defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action of trover, brought under the title of the vendor of a tract of land, against the vendee of the land, for a cotton gin, that was erected on the land and affixed to the gin house.

The court charged the jury, that if the gin could be severed and removed without serious injury to the land or gin, that it



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would not pass under the deed, and they must find for the plaintiff.

The jury found a verdict for the plaintiff, and the defendant appealed in error to this court.

The original rule of the common law was, that every thing which was affixed to the freehold was subjected to the law governing the freehold. But in later times this rule has been greatly relaxed in favor of tenants, and in relation to fixtures erected for the purposes of trade. But as between executor and heir, and between the vendor and vendee, the original rule prevails, that whatever is affixed to the freehold passes with it.

In this case, the gin was erected in the gin house, and fastened to the house by nails and braces. It was therefore permanently attached and fixed to the freehold, and this is the true and certain criterion to determine whether it passed by the deed with the freehold. *Walker vs. Sherman*, 20 Wend. Rep. 636; 2 Kent's Com. 3 ed. 345-6.

Any attempt to carry out the principle stated by his honor to the jury, would be attended with endless difficulty and uncertainty. If fixtures attached to the freehold may be removed, provided they can be severed without injury to the land, scarcely a case could occur in which they would pass by the deed.

We think the court erred in the charge to the jury, and reverse the judgment and remand the cause.

## SIMPSON vs. THE STATE.

1. Where a Circuit Judge orders a prosecution *ex officio*, it is not necessary that the order should show that it was made upon an examination of witnesses. If the order be made, it will be presumed to have been made as the statute directs.
2. No indictment for larceny lies in the courts of this State, where the property has been stolen in another State and brought by the thief into this State.
3. Where the thief is found in possession of the goods in this State, the presumption is, that the larceny was committed in the State, and if he wishes to evade a trial, he must show they were stolen in another.

*Joseph W. Perkins*, for the plaintiff.

*Attorney General*, for the State.

TURLEY, J. delivered the opinion of the court.

At the October term, 1842, of the Circuit Court for the county of Lauderdale, the following order appears of record:

"Upon motion of the Attorney General, it appearing to the satisfaction of the court, that there is reasonable cause to suspect that John Simpson and James Albrington have been guilty of larceny, and that no person will prosecute for said offence; it is therefore ordered by the court, that the Attorney General file a bill of indictment *ex officio*."

Under this order a bill of indictment was accordingly filed, without a prosecutor, against John Simpson and James Albrington, for the offence of grand larceny. On this bill of indictment the prisoner was put upon his trial at the June term, 1843, of said court, and convicted, and sentenced to confinement in the jail and penitentiary of the State for the period of five years; from which judgment he prosecutes an appeal, in the nature of a writ of error, to this court.

Upon the trial, it appeared that the prisoner and James Albrington came on shore from the steamboat Gloster, at Jackson wood-yard, in the county of Lauderdale, State of Tennessee, with the property described in the bill of indictment in their possession; that, upon being arrested and confronted with E. S. Burr, the prisoner acknowledged that the property was Burr's, and that he and Albrington, with the assistance of the Steward, had taken the same from the steamboat. The proof

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of their guilt, independent of their confession, is ample and complete.

Several causes of error are now assigned and pressed upon the court, as reasons for a reversal of the judgment of the court below.

1st. It is argued, that the order of the court under which the bill of indictment was filed, is informal and insufficient in this, that it does not show that witnesses were examined by the Judge before the order was made relative to the offence, without which the order could not be legally made.

The act of 1801, chap. 30, prohibits the filing of bills of indictment without a prosecutor marked thereon; and if it be done, authorizes the prisoner to give the act in evidence, and makes it the duty of the court to discharge him. This is the general law upon the subject; and if a bill of indictment be filed without a prosecutor to sustain it, it must be shown to be an exception from this general rule, created by statute subsequently passed.

Many such have been enacted, with most of which we have nothing to do in this particular case.

The act of 1822, ch. 40, sec. 3, authorizes the Circuit Judge to direct a prosecution *ex officio* by the Attorney General, without a prosecutor, whenever it may appear that there is reasonable ground for believing that an indictable offence has been committed, and no person will prosecute in behalf of the State. The act of 1842, chap. 65, limits the exercise of this discretion to cases in which the Judge may be satisfied from the examination of witnesses in open court, that a reasonable ground for such belief exists; and it is under the provisions of this statute that it is contended that the order directing the prosecution should have shown that proof was heard before it was made.

This statute prescribes the duty of the Circuit Judge upon this subject, and the legal presumption, in the absence of proof to the contrary, is, that it has been legally discharged. We cannot presume that a Circuit Judge has acted in disobedience to an express legislative command, and we cannot require him to show by his records, that he has not violated the law, in his orders preparatory to the commencement and prosecution of

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suits, either on the part of the State or individuals, involving matters of controversy over which he has a general and unlimited jurisdiction; it is sufficient if the contrary does not appear.

2d. It is contended that the confessions of the prisoner should have been excluded from the jury, as having been illegally obtained, through his personal fears, superinduced by threats of violence on the part of those who had arrested him.

It does not appear that the prisoner's confession of guilt was thus procured; it was made without threats, and before there were any insinuations that violence might be resorted to, to enforce a further confession and discovery relative to some paper money taken with other articles, and not found upon the prisoner, and not accounted for by him. This additional confession and discovery were, however, not obtained, and so the confession as made is good.

But it may be also observed, that, inasmuch as there is ample proof of the prisoner's guilt, independent of his confession, if there were doubt as to the manner in which it was obtained, we would not reverse therefor.

3d. It is contended, that there is no proof that the larceny was committed in Tennessee; that the goods, having been taken from a steamboat in the Mississippi river, which is the dividing line between several States, may have been actually stolen in another State and brought into this; and the offence therefore not cognizable here.

To this objection two answers are given by the Attorney General. 1st. That, though the goods were stolen in another State, yet the bringing them to this State is a continuation of the original offence; that the possession having been acquired by fraud, is still illegal, and that in consequence thereof a felonious *cepit et asportavit* here. And, 2d. If this be not so, yet, as the proof shows that the goods were stolen; that the prisoner came on shore from the steamboat in this State with them in his possession; that they were stolen from the steamboat; and it not appearing that they were taken at a different place from the place of landing, and out of the jurisdiction of the State, the legal presumption is, that they were taken in the State.

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We will examine these propositions in their order. 1st. Can a thief who steals goods in another State, and brings them into this, be indicted and punished in our courts?

This is a question of a very serious import in this country, embracing as it does a great number of sovereign and independent States, united together by a federal constitution for the protection and advancement of their common welfare; and its decision depends upon the political position they occupy in relation to each other. If they are to be considered as sovereign and independent of each other; as being deprived of none of the attributes of sovereignty but such as they have voluntarily parted from and vested in the government of the United States; then, we think, there can be no power arising out of a general law, by which the tribunals of any one State can enquire by criminal proceedings into the manner in which the possession of property has been acquired in another; and this because there can be no general law upon the subject applicable to them; each State having the sole and unrestricted right to provide for itself such rule of action, and such punishment for its violation, as may be deemed best to comport with the welfare, peace, and harmony of that portion of society over which it presides.

But if, on the other hand, they are to be considered as mere municipal divisions of one great body politic, under one general head, occupying the same relation to each other that one county in England or one department in France does to another, there will be as little difficulty in assuming that the power does not exist. Which of these relations exists, we apprehend, cannot now be a matter of serious controversy. We hold it to be sovereign, and not to be municipal; that these States in their intercourse as such, are as sovereign and independent as are the different members of the Germanic confederation, or the cantons of Switzerland. This being so, a breach of the common law of our State is no more cognizable in another than would be a breach of the criminal law of Mexico, Texas, France, or England. From a want of the proper understanding of this our social position, some discrepancy has existed in the different States of the Union, in the application

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of the principles of the common law to the subject now under consideration. (It is well settled in England, that, by the common law, if a felon steal property in one county and carry it to another, he is guilty of larceny in that county, and may be there indicted and punished; and this is upon the ground that it is a continuing felony, and that the person is equally guilty in the one county or the other, the common law being supreme over each, and a punishment in one a satisfaction for the offence in the other; but before it can be pronounced to be a continuing felony, the first taking must be adjudged to have been felonious, which would have been a work of supererogation, when that taking had been in a foreign and independent State; and that such was the opinion of common law lawyers of England, is most satisfactorily established by Butler's case, 3d Institute 118.) That case was this: Butler and other pirates, in summer vacation robbed divers of his majesty's subjects upon the coast of Norfolk, upon the high seas, and brought divers of the goods taken into the county of Norfolk, and then were apprehended with the goods.

The question moved by Wray, Chief Justice, and Justice Perryman, Justices of Assize in Norfolk, was, whether they might be indicted for felony in Norfolk; as if one steals goods in one county and carries them into another, he may be indicted in either county; and it was resolved by them, that they could not be indicted for felony in Norfolk, because the original taking was no felony whereof the common law took cognizance; because it was done upon the sea out of reach of the common law, and therefore not like the case where one stealeth in one county and carries the goods into another; for the original act was felony whereof the common law took cognizance. There is no case, that we are aware of, in conflict with this decision. No case in which a larceny committed out of the realm of England, has been punished in the Courts of England, even though it were in Scotland or Ireland, previous to the passage of the statute of George III, chap. 31, which was enacted for the express purpose of giving the Courts of England cognizance of such offences, where the goods were stolen in

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another part of the United Kingdom and brought into England, and *vice versa*.

This question has never been presented before for adjudication in this State; but it has in several of the other States. It was directly presented in North Carolina, in the case of the *State vs. Brown*, reported in 1st Haywood's Rep., 100, in which it was held, after a careful and able examination by Judge Ash, that the stealing of a horse in the territory south of the Ohio, was not an offence punishable in North Carolina, though the horse was brought by the thief into that State. The same question was presented to the Supreme Court of New York, in the case of *The People vs. Gardner*, 2 Johnson's Rep. 477, and received a similar determination. In that case, the prisoner had stolen a horse in Virginia, and fled into the State of New York, where he was apprehended with the horse in his possession; and it was held that he could not be tried in that State for the felony, but was to be considered merely as a fugitive from justice. Subsequently, it was enacted by the revised statutes of New York, "that every person who shall feloniously steal the property of another, in any State or county, and shall bring the same into this State, may be convicted and punished in the same manner as if such larceny were committed in that State, and that in every such case, such larceny may be charged to have been committed in any town or city into which the stolen property may have been brought." This is a municipal regulation of that State, obligatory upon her tribunals; and of course under it a different decision from that of Gardner's case has been made; as was done, in the case of *The People vs. Burke*, 11 Wendell, 129. The same question has also been presented to the Courts of Massachusetts, and received a decision directly the reverse of that given in North Carolina and New York. As this opinion is also at war with the opinion to which this court has arrived upon the same subject, we will examine it, and test it upon principle and authority.

The question arose in the case of *The Commonwealth vs. Thomas Anderson*, and is reported in 2d Mass. Rep. 14. The prisoner was indicted for receiving goods which had been sto-

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len in the State of New Hampshire, knowing them to have been stolen. The case was very ably argued for the defence, and determined against the prisoner, upon the authority of two cases, which it appeared had been previously decided, upon the same point, in the same State, viz: that of Cullen and that of Paul Lord. The reasoning of the court in those cases, we are not in the possession of, and therefore can say nothing about them. But the court, in the case of Anderson, does not base its determination solely upon the authority of the previously adjudged cases, "Cullen and Lord," but attempts to rest it upon principle, which we can examine.

Parker, J., says: I hold myself bound by the authority of Cullen's case, and that of Paul Lord, unless I were convinced that those decisions were against law. If solemn and repeated determinations of this court are not to be regarded, I know not how we are to govern ourselves. But upon principle, independent of these cases, it appears to me, that the common law doctrine respecting counties, may be extended by analogy to the cases of States, united as these are, under one general government." And of the same opinion, and for the same reasons, was Thatcher, J., and Sedgewick, J. Now, it may have been right and proper that this court should have felt itself bound by the precedents referred to; but we cannot recognize the reasoning upon principle. There is no analogy by which the common law doctrine respecting counties can be extended to the cases of States. These States are not under one general government, in the sense that the counties of one State are. The general government of the United States has no power to act in and over the States, except by express grant and necessary implication; and its action is necessarily confined by the constitution to their limits. Not so with the States. Their exercise of sovereignty is limited, not granted; and it, therefore, may be extended to all subjects of local legislation, which they are not prohibited by these own Constitutions from acting upon, or the right of action upon which they have not transferred from themselves to the General Government.

The State authority is, therefore, sovereign over its counties;



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a law passed by it, or adopted by it, is equally obligatory upon all, and may be enforced in all according to its provisions, being omnipotent and co-extensive with the limits of the State, but no further. So soon as this boundary is passed, another rule of action, based upon a different authority, the sovereign power of another State, springs into existence, exercising its control over a different section of country, unrestricted and uncontrolled by that of the other; and it being well settled that the criminal and penal laws of one independent State cannot be recognized and enforced in another, we cannot comprehend the analogy spoken of by Judge Parker. Sedgewick, Judge, in delivering his opinion in the same case, says, more emphatically than Parker, that he is satisfied that the conviction is right upon principle. He says, that the only reason which appears to have influenced the court in the case of Butler, before referred to in 3d Institute 113, was that the jurisdiction of another court of the same government had attached, previous to any crime having been committed of which that court had jurisdiction. But it does not determine that if goods had been stolen in another country and brought into England, the fraudulent possession there would not have been considered such a taking as to constitute a theft. Now with due deference, we think it does so determine, and that the reason for the decision of the case was not that the court of admiralty had jurisdiction. If that had been the reason, how easy to have said so; but no, the reason is given—"they could not be indicted for felony in Norfolk because the original taking was no felony, whereof the common law took cognizance." Why? The answer is given: "because it was done upon the sea, out of the reach of the common law;" not because it was done within the reach of the admiralty law, as Sedgewick, Judge, says. Can it be possible that a stealing on the high seas, off the coast of England, should be held to be out of the reach of the common law, and the same stealing, if it had taken place in France, within it? Most assuredly not.

Independent of this incapacity of the municipal law of one country to take cognizance of criminal offences in another, which we hold to be well settled, so various are the provisions

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of different countries in creating and punishing criminal offences, that it may be said, with much plausibility, that the power should exist. A taking of property under certain circumstances may be and is often declared by law to be a larceny in one State which is not a larceny in another. If under these circumstances property be taken in one State and carried to the other, how is the case to be treated? Take the case of obtaining goods by false pretences; it is larceny by the laws of Tennessee, but not by the law of Arkansas. Goods are thus obtained in Tennessee and carried by the thief across the Mississippi river into Arkansas. Can he be there tried and punished for the theft? If he be, it must be under the Tennessee statute, and not under any law obligatory in the State of Arkansas. The possession of the goods in Arkansas is not felonious, though it were so in Tennessee, because the Tennessee statute can have no obligatory force in Arkansas courts; and this absurdity is of necessity the result, if the principle contended for in the Massachusetts case be law. [If the law upon the subject constitutes a larceny in two different States the same, and property be stolen in one and carried to another, the criminal may be punished in either. But if they be different, and the taking be a larceny by the law of the place where the property is, but not by the law of the place to which it is removed, he can only be punished at the place where it was taken. If it be no larceny by the law of the place to which it is removed, because the possession was not in its inception felonious, and cannot be made so by matter *ex post facto*, this would make it necessary, in all cases, to enquire whether, by the law of the State where the goods were taken, the possession was feloniously obtained. This will of necessity cast upon the judicial authorities of one State, the necessity of enquiring into and expounding the criminal laws of another, and that with a view of inflicting punishment under them. This difficulty was felt by Judge Sedgewick, in the opinion now under consideration. He gets rid of it by saying, he does not know why it might not be done, if necessary, but that it is not necessary; in which we think he is mistaken, for the reasons given.

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Upon the whole, we think that the decisions of the Court of North Carolina and the Court of New York, previous to her revised statutes, have expounded the law upon this subject correctly; and hold that no indictment for larceny lies in the Courts of this State for property stolen in another, and brought by the thief into this, and that he is only to be criminally considered as a fugitive from justice.

But 2d. It is said that it does not appear that the property was stolen in Tennessee, and that in the absence of proof to that effect, the presumption is that it was stolen, and of this opinion is the court. The proof shows that the steamboat landed at Jackson's wood-yard, in the county of Lauderdale, State of Tennessee; that the prisoner came on shore with the goods in his possession, and that they were stolen goods; the legal presumption is that they were stolen at that point; and if the prisoner wished to evade a trial for the offence in the Tennessee Courts, it was incumbent upon him to have introduced the proof, showing that the larceny was committed beyond the limits of this State, and that he had therefore been guilty of no violation of the criminal code. This he has not done.

We, therefore, affirm the judgment of the Circuit Court.

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#### WOOD vs. HANCOCK.

1. Hancock summoned Wood, by warrant, to answer him as assignee of C. S. Brodie, former guardian of C. H. Howard, and offered on trial a note payable to Charles S. Brodie, guardian of Cornelius H. Howard: Held, that there was no variance between the warrant and note, which should exclude it.
2. The warrant is not in lieu of a declaration. It is simply a summons to the defendant to appear and answer, and it may be laid down as a general rule, that whatever may be done in a court of record, by proper pleadings and proof, may be done before a Justice of the Peace, upon the production of the proof alone.

In this case a judgment was rendered by a Justice of the Peace of Perry county, in favor Hancock, assignee, against Wood. Wood appealed, and at the January term, 1844, of the Circuit Court, Totten, Judge, presiding, a verdict was rendered in favor of the defendant.

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The plaintiff appealed. The facts are stated in the opinion of the court.

*Parrott*, for Wood.

*Allen*, for Hancock.

GANN, J. delivered the opinion of the court.

This suit was commenced by warrant before a Justice of the Peace. In the warrant, Hancock is summoned to answer Wood, assignee of Hiram Boren, who was assignee of C. S. Brodie, former guardian of C. H. Howard. Judgment was given for the plaintiff by the Justice, and the defendant appealed to the Circuit Court. When the cause came on to be tried in the Circuit Court, the plaintiff produced the following note:

"On or before the 1st day of January, 1840, I promise to pay Charles Brodie, guardian of Cornelius Howard \$190, for value received. Witness my hand and seal, this 2d January, 1839.

JOEL C. HANCOCK, [Seal.]

This note was assigned by C. S. Brodie to Hiram Boren, and by Boren to the plaintiff, Wood. The plaintiff proved the several endorsements on the note, and offered to read it as evidence to the jury. To which the defendant objected, on the ground of a variance between the note offered and the warrant, in this; the warrant states, that the plaintiff is assignee of Boren, who was assignee of C. S. Brodie, former guardian of C. H. Howard; and the note is payable to Charles Brodie, guardian of Cornelius Howard. The court sustained the objection, and refused to permit the note to be read, and a verdict and judgment were rendered for the defendant.

The question now is, whether the variance is such as to have made it proper for the court to have refused to permit the note to be read as evidence.

In proceedings before Justices of the Peace, the strictness in pleading, which is required in courts of record, has never been

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enforced. All that we can expect, or demand from these domestic tribunals, is, such reasonable precision and certainty in their proceedings, as may be necessary for the attainment of justice.

It has often been held by this court, that it is not necessary that the warrant should set out the cause of action with that particularity and precision which are required in a declaration in a court of record. Some general statement indicating the grounds of the action, so that the defendant may not be misled in preparing his defence, is all that is necessary. The warrant does not stand in lieu of a declaration. It is simply a summons to the defendants, to appear and answer. The pleadings are *ore tenus*. And that which in a court of record may be done by proper pleading and proof, may as a general rule, be done before a justice of the peace, by the production of the proof alone.

Here, the suit is brought correctly, as the assignee of C. S. Brodie, guardian of C. H. Howard. The note is payable to Charles Brodie, guardian of Cornelius Howard. There would have been no difficulty in maintaining the action in a court of record, upon this note, by proper averments in the declaration. But before a Justice of the Peace there is no declaration.

Shall a party be defeated of his remedy, because he is in a court where he does not plead on paper? Surely this would be to pervert the ends of justice; the attainment of which, is the great end in view. Brodie's endorsement on the note corresponds with the warrant. His name is there written C. H. Brodie, and his assignment, and that he was the payee of the note were proved. We think the note should have been read as evidence.

Reverse the judgment, and remand the cause.

**HALLOWAY vs. LACY.**

1. Courts in the construction of covenants, should favor that construction which is obviously most just.
2. Lacy agreed, by covenant, to serve Halloway as overseer for a term of time, for the sum of \$200: Held, that this was a dependent covenant, and that Lacy had no right of action against Halloway till he had performed the services.

A verdict and judgment were rendered in this case, in the Circuit Court of Fayette county, in favor of the plaintiff, Lacy, against Halloway, (Dunlap presiding Judge,) from which the plaintiff appealed.

*W. T. Brown*, for plaintiff in error.

*Coe*, for defendant in error.

**GREEN, J.** delivered the opinion of the court.

This is an action of covenant upon the following agreement:

“Articles of agreement made and entered into this 6th of December, 1841, between Stephen P. Halloway, on behalf of the estate of Samuel Y. Tanner, of the one part, and Robert J. Lacy of the other part, witnesseth; that the said S. P. Halloway agrees, on his part, to pay the said R. J. Lacy the sum of two hundred and twenty-five dollars for his services as overseer of said estate of S. Y. Tanner. And the said R. J. Lacy, for his part, agrees to attend strictly to the business affairs and interest of said estate, to do and perform every thing which may be requisite, and necessary, and customary in the capacity of overseers; and to be governed in all things according to the instructions of said J. P. Halloway; and the said Lacy is to commence overseeing on the 1st January, 1842. In testimony,” &c.

The court told the jury, that the undertaking of the defendant in this covenant was independent of the plaintiff's undertaking, and obliged the defendant to pay the sum of money therein specified, whether the plaintiff ever performed his undertaking or not. The jury found for the plaintiff, and the defendant appealed to this court.

[Halloway vs. Lacy.]

The only question in this case is, whether the Circuit Court construed this covenant correctly. The relative position of the stipulations in this covenant, and the failure to specify at what time the money was to be paid, favor the construction of the Circuit Court, and inclined our minds, when the case first came up for consideration, to concur with the judgment of his Honor. But subsequent reflection satisfies us that the covenants of the parties are dependent.

Courts are strongly inclined, to favor this construction as being obviously the most just. 1 Peters, 465. No technical words are necessary to render a stipulation precedent or subsequent. Nor does it depend on the position of the words; but it rests on the good sense and plain understanding of the contract, and the acts to be performed by the parties respectively. 2 John. Rep. 148; 1 Chitty's Pl. 279; 5 Ed. Again: Chitty says: (1 Ch. Pl. 280, 5 Am. Ed.) "In general, if the agreement be, that one party shall do an act, and for the doing thereof the other shall pay a sum of money, the doing of the act is a condition precedent to the payment; and the party who is to pay, shall not be compelled to part with his money till the thing shall be performed." See John. Rep. 146; 10 John. R. 208, 266.

In this covenant Lacy undertakes to be overseer for Halloway, to commence the 1st of January, 1842; and for that service, Halloway undertakes to pay the sum of \$225. Now, although it is not stated at what time the money is to be paid, yet as it is to be paid for Lacy's services as overseer, the sense of the contract, and the evident meaning of the parties, are, that the money is to be paid when the services shall be performed.

We think, therefore, that this is a dependent covenant, and that the plaintiff must prove a performance on his part, to entitle to recover on the covenant.

Reverse the judgment, and remand the cause.

JARNAGIN *vs.* ATKINSON.

- 1 Where a sheriff has paid money for his deputy he can recover a judgment against the deputy by motion, without having the extent of such sheriff's liability ascertained by a judgment against him.
2. The sheriff is by law the collector of state and county taxes, and a bond given by a deputy sheriff faithfully to discharge the duties of a deputy. embraces a defalcation in not paying over taxes collected by such deputy.
3. The granting or refusal of a continuance, is discretionary in the Circuit Court, and the proceeding of the court will not be reversed in such cases, unless a palpably clear case of injustice is made out.

This motion was made in the Circuit Court of Fayette county, by N. Atkinson, sheriff, against his deputy, Johnson, and sureties, for a failure to pay over taxes collected by him as deputy.

The defendant, by his attorney, after a continuance, moved for a second, on the ground of a letter from the defendant, stating that one of his children had just died and another member of his family was sick, and that his presence was necessary in the trial of his case. The counsel for the defendant stated in an affidavit, that he believed the statements of the letter were true. The court refused to continue the case.

A judgment was rendered by Judge Dunlap in favor of the plaintiff, from which the defendant Johnson appealed.

*H. G. Smith*, for the plaintiff in error.

*John C. Humphreys*, for the defendant in error.

**TURLEY, J.** delivered the opinion of the court.

Nathaniel Atkinson, sheriff of Fayette county, appointed Wm. D. Johnson his deputy, and took from him a bond for the faithful performance of his duty as such, with the testator of the plaintiff in error and others as his sureties. The tax book, embracing the state and county tax for 1841, was placed in the hands of the said Wm. D. Johnson, for collection, who performed his duties in relation thereto so faithlessly and negligently, that his principal, the defendant in error, was made responsible for heavy amounts upon both tax lists; the Chairman of the



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County Court having, by the judgment of the Circuit Court of Fayette, rendered at its May term, 1842, recovered against him the sum of \$2042 72, balance of county tax for the year 1841, and \$235 34, damages thereon; and he having paid to the treasurer of the state the sum of \$2566 82, the state tax for Fayette county for the same year. For these several sums, defendant in error moved for a judgment against the said Wm. D. Johnson and his securities on their bond, and obtained the same at the May term, 1843, of the Circuit Court of Fayette, from which the plaintiff in error appealed to this court.

It is now contended, that the judgment should not have been rendered, because:

1st. There is no judgment against the sheriff for the amount of the state tax for the year 1841, and therefore his liability to pay it has not been legally ascertained.

The statute of 1829, chap. 41, provides, that in all cases when any sheriff shall have paid money, or become liable to pay money, for the default or misconduct of his deputy, it shall and may be lawful for him to recover judgment by motion against such deputy and his sureties. Two cases are here provided for: 1st, when the sheriff shall have paid money; 2d, when he shall become liable to pay money. Now, if money be not paid, and the sheriff seeks to obtain a judgment on motion against his deputy, by reason of a liability to pay, cast upon him by the misconduct of the deputy, he must show that such liability has been ascertained against him by the judgment of a court, as was held in the case of *Colman* against *Patterson*. But when the sheriff has paid the money, there is no necessity for such judgment, as he is authorized—in fact it is his duty—to pay in all cases of liability without judgment.

2d. It is said, the bond in this case executed by the deputy is not broad enough to cover the responsibility; that the bond is given for a faithful performance of his duty as deputy sheriff; that the office of the sheriffalty and collector of the revenue are distinct and separate offices, and the deputy sheriff is not deputy collector. It has been held in this State, that the collection of the revenue is devolved by law upon the sheriff; and that although he gives a bond as collector, yet he collects as sheriff

[ *Kain & Horn vs. Kelly* ]

and not under a distinct, separate authority, created by another officer. This being so, the deputy sheriff may collect; and if in doing so, he act so negligently or faithlessly as to discharge his principal, he is responsible therefor as deputy sheriff, and of course his securities.

3d. It is contended, that the court erred in refusing a continuance. A continuance or refusal being so purely a matter of sound discrimination in the court below, it would require a very extraordinary case for a reversal, upon this ground, if it would be done at all. Such a case is not the present.

There is, then, in our opinion, no error in the proceedings below; and we affirm the judgment.

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**CAIN & HORN vs. KELLY.**

1. Where a Jailor employed a slave, who was committed to jail as a runaway, in the cultivation of his farm, such employment was a conversion of the slave, which rendered both the Sheriff and the Jailor liable in the event of the escape of such slave.
2. The principles of the case of *Horsely against Branch*, 1 *Humphreys*, approved and applied.

This action was tried by Judge Dunlap and a jury of Tipton county, and a verdict and judgment rendered in favor of the plaintiff, Kelly, against Horn, the Sheriff of Tipton county, and his Jailor, Cain, for the sum of \$400. The defendants appealed.

*Coe*, for the plaintiffs in error.

*H. G. Smith*, for the defendant in error.

**GREEN, J.** delivered the opinion of the court.

There are two counts in the declaration in this case; one in trover, and the other in case. The facts are these: the negro boy Henry, the subject of this suit, eloped from the plaintiff, his owner, in Shelby county, and gave himself up to a Justice

[Cain &amp; Horn vs. Kelly.]

of the Peace in Tipton county, and was by said Justice committed to jail as a runaway slave. Cain the jailor received him into his custody, where he continued several months. While in Cain's custody, the negro was set at large by him, and employed in his service, ploughing his ground, chopping his wood and conveying water, and in consequence of the negligence, with which he was kept, made his escape, and has not been recovered by the plaintiff. Horn was the Sheriff of Tipton county at the time and Cain was his jailor.

The jury found a general verdict for the plaintiff for \$400, and the defendants appealed to this court.

The counsel for the plaintiffs in error, make the following points:

1st. That the employment of the negro by Cain, in laboring for him, was not a conversion.

2d. That the count in case cannot be supported, unless it appear that the escape of the negro was the immediate consequence of the negligence of the jailor, which is not shown, &c.

3d. That the defendants were improperly joined in this action. 1. In the case of *Horsley vs. Branch*, 1 Hump. R. 199, and the case of *Angus vs. Dickerson*, Meigs' Rep. 640, this court decided, that if one hire the personal property of another, for a special purpose, and misapply such property by employing it in a manner not authorized by the contract, it is a conversion. The reason is, that such use of the property is without authority, and so far as that act is concerned it is the same thing as though no contract existed.

The principle here laid down is applicable to this case. The jailor had no right to employ the slave, which was committed to him, otherwise than according to the object and purposes for which he was committed. He was placed in the jail for safe keeping; and the setting him at large, and employing him to labor in the field and chop wood, are acts incompatible with his duty, to keep him safely. They constitute, therefore, a conversion. Story on Bailments; sec. 87 *et seq.* So at common law, to labor an estray is a conversion. 3 Dane's Ab. 192; 5 Bac. Ab. 255. Our statute which authorizes by implication the use of an estray, after it shall have been appraised,

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enlarges the authority of the party taking up such estray, (C. & N. 562, sec. 11,) and does not restrict it. Before that statute, it would have been unlawful for the party taking up an estray to labor it at all; but as the statute expressly prohibits such use, before it shall be appraised, its employment afterwards in moderate labor may thereby be made lawful. The true rule in such cases of bailment is, that whenever the use of the thing will be a benefit to the owner; such as milking a cow, or exercising a horse for his health, &c., it is lawful, and is no conversion; but where it is to the injury of the owner, or where it places the property in such a situation as exposes it to the danger of injury or loss, such use is unlawful, and is a conversion.

2. It is insisted, that the escape of the negro is not shown to have been the immediate consequence of the act of the jailor in putting him to labor: and, therefore, under the authority of the case of *Horsley vs. Branch*, the count in case is not supported. It is true the act of putting the negro to labor is not the gist of the count in case, as it is of that in trover; but the facts, that the jailor was in the habit of turning the negro out of the jail and putting him to labor, thereby neglecting to keep him safely, were very properly left to the jury to enable them to determine whether the escape of the negro was in consequence of such negligence. Although the jailor may have set the negro at large, and kept him negligently; yet if afterwards, when he was guilty of no negligence, the escape was effected, he would not be liable in case of his former misconduct.

It must appear that the injury occurred from the immediate negligence of the defendants. And this is the doctrine of the case of *Branch vs. Horsley*. But the jury were warranted from the facts proved, to infer that the escape of the negro, was effected in consequence of the jailor's negligence. The proof shows that he was in the habit of placing the negro in a situation in which an escape could be easily effected: and that shortly after these acts the negro did escape. The inference that the escape was in consequence of a like act of negligence was quite natural.

3. We think the Sheriff and Jailor are both liable in this action. The jailor is the sheriff's deputy, and the sheriff is liable

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for the default of his deputy; and as the injury resulted from the active personal wrong of the jailor, he is also liable to an action for the wrong. 1 Ch. Pl. 97. If there be a tortious conversion of property by an agent, in his performing an act appertaining to his agency, the principal and agent are both liable. Story on Agency, sec. 311; 452, 453.

Let the judgment be affirmed.

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### HAND vs. THE STATE.

The act of 1833, ch. 43, sec. 1, requiring Attorneys General to examine the execution docket and take judgment against the Sheriffs, where they have failed to make returns of executions, authorizes judgment in the name of the State for sums due the State, County and Common Schools. It does not authorize judgment in the name of the State for amounts due individuals.

This motion was made at the January term, 1844, of the Circuit Court of Perry county, by the Attorney General, in the name of the State against the Sheriff and his sureties, Totten, Judge, presiding. A judgment was rendered in favor of the State, from which the defendant appealed. All the facts in reference thereto, are stated in the opinion of the court.

*Bullock*, for the plaintiff in error.

*Attorney General*, for the State.

REES, J. delivered the opinion of the court.

There were two executions in the hands of the Sheriff of Perry county, at the suit of the President and Directors of the Bank of Tennessee, issued from the Circuit Court of that county, which he failed to return according to law. Upon each of these executions there was due to the State the sum of two dollars and seventy-five cents, as State tax; and the Attorney General moved the court for a judgment against the Sheriff and his sureties on behalf of the State, for the amount of the State

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tax. The court, however, on such motion rendered judgment against the Sheriff and his sureties, on behalf of and in the name of the State, not for the tax alone, due to the State, as received upon said executions, but in addition thereto, for the entire amount of the two executions. The judgment to this extent, it is argued, is authorized and maintained by the provisions of the act of 1833, ch. 43, sec. 1. Without feeling called upon in the present case to make the attempt by judicial construction to clear up the obscurities which exist in the details of the first section of that statute as to the legislative meaning; we are satisfied that it was not the purpose of the statute to authorize the State, on the motion of the Attorney General, to recover in its own name against the defaulting officer and his sureties, not only the taxes and fines that might be due to the State, the county or common schools, but the debt and costs also, which might be due to the plaintiff and others upon the execution, the non-return of which might constitute the grounds of a motion. If to the latter class of claimants a remedy be given by the statute against the sheriff, on the motion of the Attorney General, in terms sufficiently distinct and intelligible to make that remedy effective, still such proceeding must be conducted in the name, at the instance and for the benefit of the claimant, and not in the name, or at the instance of the State.

The official motion of the Attorney General is limited by the intention of the act to the taxes and fines due to the State, to the county and to the common schools. These it is believed can be recovered in the name of the State, and upon motion of the Attorney General. But it was not the purpose of the statute, it seems to us, to lend either the name of the State or the services of its officers to the objects or obtrude itself amidst the affairs of private individual claimants. So to hold, would make the State recover in its name, and by its Attorney General, and retain as a trustee for citizens, all that might be due, to all persons throughout the State, upon non-returned executions; for a State tax must be due upon each one of such executions. From such a construction the good sense of every man recoils at once. It would plunge the community into difficulties, which it is not possible to foresee or estimate the consequence of.

[*Calhoun vs. The State.*]

The judgment will be reversed, and a judgment given for the State tax only.

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CALHOUN vs. THE STATE.

1. The principles of the case of *Chappell vs. The State*, 8 Yerger, 166, approved.
2. The jurisdiction of a court to which a criminal case has been transferred by change of venue, is not ousted by a failure to enter on the minutes of the court at the first term a transcript of the record of the case.
3. The principles of the case of *McClure vs. The State*; 1 Yerger, 200, approved.

This case was tried by Judge Totten and a jury, and a verdict and judgment rendered against the prisoner, from which he prosecuted an appeal.

*Huntsman*, for plaintiff in error.

*Attorney General*, for the State.

TURLEY, J. delivered the opinion of the court.

At the February term, 1842, of the Circuit Court of Wayne county, the prisoner was indicted for the crime of murder; and upon arraignment pleaded not guilty. There not being sufficient time for the dispatch of the business of the court, a special term was appointed to commence on the third Monday in April then next ensuing, till which time the trial of the issue between the State and the prisoner was continued.

At this special term, an attempt having been fruitlessly made to obtain a jury, the venue of the case was changed, under the provisions of the statute of 1833, chapter 11, to the adjoining county of Hardin.

At the May term, 1842, of the Hardin Circuit Court, it being the first term thereof after the change of venue, the case was continued, and an order made directing the clerk of the Circuit Court of Wayne to transmit a full and perfect transcript of the record to the Circuit Court of Hardin, which was done, and

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spread, by order of the Judge, upon the records of that court, at its September term, 1842; at which said time the prisoner was tried and convicted of murder in the first degree, and sentenced to suffer death. Upon a motion for a new trial, he filed an affidavit, assigning as cause therefor, that one of the jurors by whom he was tried, was not a freeholder of the county of Hardin; which fact was unknown to him (the prisoner) at the time he was accepted as a juror, and until after the verdict was rendered. The motion for a new trial, as also a motion in arrest of judgment, was overruled; and thereupon a writ of error is prosecuted to this court; and three causes are assigned as error. 1st, That it does not appear of record that the grand jury of Wayne county returned the bill of indictment against the prisoner in open court, found to be a true bill. The entry of record as certified by the clerk of the Wayne Circuit Court to the Hardin Circuit Court is in the words and figures following, viz:

"Tuesday, February 8th, 1842. The grand jury came into open court under the care of their officer, and returned a bill of indictment against John H. Calhoun, Nathaniel Reeves and David Staggs, which is in the words and figures following, to wit: [Here the bill of indictment against the prisoner and said Reeves and Staggs, for the murder of one George T. Choat, with the endorsement thereon, is set forth.] A true bill.

ABSALOM GRANT, Foreman of the Grand Jury."

This is the entry on the minutes of the Wayne Circuit Court, made in pursuance of the act of the legislature, which requires bills of indictment in cases of felony to be spread at large upon the minutes, and is sufficiently specific and certain. It does therefore appear of record, that the bill of indictment upon which the prisoner was tried and convicted, was returned into open court by the grand jury, who found it a "true bill."

2d. It is contended, that the records of the proceedings in Wayne should have been spread upon the minutes of the Hardin Circuit Court, at the first term thereof after it had acquired jurisdiction of the case by the change of venue; and that, as this was not done, but at a subsequent term, the trial was *coram non judice*, and the judgment must therefore be reversed.



[Calhoun vs. The State.]

At the first term of the Hardin court after the change of venue, there not being a correct copy of the record from Wayne filed, the case (as we have seen) was continued, and an order made upon the clerk of the Wayne court to make out and file a full and perfect transcript thereof, which was done, and by order of the Judge spread upon the records of the Hardin Circuit Court, at its September term, 1842, previous to the trial of the prisoner. The act of 1839, chapter 11, provides, "that when the venue of any criminal case shall be changed, it shall be the duty of the clerk of the court changing the venue, to make out a full and complete transcript of the record and proceedings in said cause, and transmit the same to the clerk of the court to which said venue is changed, which said transcript shall be entered in full upon the minutes of said court." The requisites of this statute upon this subject have been strictly complied with. The statute does not require that the exemplification should be made at the first time; and this very case proves that it would have been impolitic so to have provided. An imperfect copy of the record from Wayne is filed, and it becomes necessary to make an order for the procuring a correct one: this cannot be done in time to have it spread upon the minutes at the then term; of necessity it is done at the next, and this must oust the jurisdiction of the Hardin court, as it is argued by the prisoner's counsel. What would be the consequence? The Wayne court would have no jurisdiction of the case, because that was ousted by the change of venue; and the Hardin court having no jurisdiction because of the failure to spread the record upon the minutes at the first term, the prosecution has been abated, and the prisoner must be discharged, or recommitted for a new prosecution in the county of Wayne, to receive the same course of the change of venue to Hardin or some other adjoining county, and perhaps of abatement, if by neglect or connivance a correct copy of the record should not be filed in time. This would be very absurd, and productive of no benefit to the prisoner, but of much and useless expenditure on the part of the State, and of hindrance and delay in the administration of criminal justice. This is not the construction of the statute, and the record from Wayne has been exemplified in due time.

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3d. It is contended, that a new trial ought to have been granted, for the causes forth in the affidavit, specified in the bill of exceptions. This has been so repeatedly held in that state to be no cause for a new trial, and the reasoning therefor has been so repeatedly gone into, in various cases heretofore examined and reported, that we deem it wholly unnecessary to add a word further thereto.

Then, upon a full and perfect view of the case, we are constrained to say, that there is, in our opinion, no error in any part of the proceedings for which the judgment of the court below can be reversed, and affirm the same.

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**ROGERS vs. Lessees of REBECCA PARK et al.**

1. An attorney is an officer of the court, and when he institutes a suit the presumption is that he is duly authorized to do so; and therefore a power of attorney not authenticated, a letter, or any parol evidence which raises a reasonable presumption of the existence of authority, is sufficient.
2. The plaintiffs claim as heirs of Benjamin Steadman; they proved that they are the heirs of Sarah Steadman, and that Sarah was the daughter of Benjamin. There is nothing which casts any doubt on the legitimacy of Sarah nor any proof that Benjamin Steadman was ever married. Held, that the marriage of Benjamin Steadman and the heirship of the plaintiffs was sufficiently established; Benjamin having been long dead, and the controversy not being between persons claiming under conflicting claims of heirship.
3. The case of *Gardner & Mosely vs. Brown*, 1 Hump. 354, approved.

Ejectment for 3840 acres of land in Obion county, by S. Spellings and Mary Parks against Rogers.

The defendant, upon affidavit filed, moved that the attorney prosecuting the suit be requested to exhibit his authority for so doing. This motion prevailed, and an order in conformity therewith was made; and that if the authority should not be produced, that the suit should be dismissed. Thereupon, the attorney, William Fitzgerald, produced powers of attorney purporting to have been executed by E. Spellings and Mary Parks to W. Fitzgerald, authorizing him to prosecute an action of ejectment for the land in controversy. These powers of attorney were not authenticated, as the law directs, to render them

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admissible as evidence, and were objected to by the defendant, but the court overruled the objection and discharged the motion.

The cause came on for trial at the June term, 1843, in the Circuit Court of Dyer, (the cause having been transferred to that county,) Harris, Judge, presiding.

The plaintiffs introduced a grant from the State of North Carolina to Benjamin Steadman, and claimed the land as the heirs at law of said Steadman, who had been a soldier of the revolution, and died not long thereafter, the precise time not appearing. He left one child only, to wit, Mary Steadman.

It did not appear, from the proof, that B. Steadman was ever married or was not, and there was no proof casting a shade of suspicion on the legitimacy of Sarah.

The plaintiffs were the heirs at law of said Sarah.

The defendant introduced records of the condemnation and sale of the land in controversy for the taxes for two several years and deeds by the sheriff for the same, the one to Hamilton and the other to Rogers, the defendant.

The jury, under the charge of the court, returned a verdict in favor of the plaintiffs. A motion for a new trial being made and overruled, and judgment rendered, the defendant appealed.

*Totten*, for the plaintiff in error.

*Fitzgerald*, for the defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of ejectment, in which there was judgment for the lessee of the plaintiff in the court below, which is sought to be reversed here upon three grounds.

1st. That there is no sufficient evidence of authority in the attorney of the plaintiff to commence and prosecute the suit. A rule was made upon the attorney in the Circuit Court to produce his authority; in compliance with which he produced powers of attorney from Elizabeth Spellings and Rebecca Park, the lessors, authorizing him to prosecute the suit. The execution of these powers was proved in the State of North Carolina;

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that from Rebecca Parks in the Superior Court of Law for that State, at the October term, 1842, before M. E. Manly, one of the presiding Judges of that court, by the subscribing witness, which fact is certified by him and by the clerk, who also certifies that Manly was a judge of that court. That from Elizabeth Spellings was proved by the subscribing witness at the spring term, 1843, of the same court, and certified in the same manner as that from Rebecca Parks. These certificates of probate, it is contended, are not legally authenticated, and that therefore the powers of attorney were not competent evidence under the rule and in discharge thereof. We think they were properly received by the Circuit Judge. A power of attorney authorizing the commencement or prosecution of a suit, need not be proved with the formalities required when it is sought to be used as a muniment of title. The attorney is an officer of the court, responsible to it for a proper and faithful discharge of his duties; and although when required he must produce satisfactory evidence of his authority to prosecute a suit, yet the presumption is not against, but in favor of his authority; and therefore it has never in this State been required that he should produce a power of attorney authenticated by the forms of law: in fact, a power of attorney in form has not been required at all: any written communication by letter or otherwise, giving the authority or recognizing it, has been held to be sufficient, as would any parol proof of the same fact, as all the court asks, in addition to the attorney's official responsibility, is such proof as will raise a reasonable presumption of the existence of the authority: such we think these powers of attorney, authenticated as they are, to be.

2d. It is contended, that there is no legal proof that the lessors of the plaintiff are the heirs at law of Benjamin Steadman, the grantee of the premises in dispute, in which character they claim. The lessors trace their descent by clear and legal proof from Sarah Steadman, who is proved to have been the daughter of Benjamin Steadman, the grantee; but there is no proof that Benjamin Steadman was ever married, as there is also none tending in the slightest degree to attach to Sarah the charge of illegitimacy. The proof shows, that Benjamin Stead-

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man was a soldier of the revolution, and has been dead a great many years. This, together with the probability arising from the unsettled state of the country, before and during the revolution, that there may be no record evidence of his marriage, would render it exceedingly difficult to produce direct proof of it. This, indeed, is not required in any case, when the marriage is of as long standing as this; but the same may be established by reputation; and although the proof being unskillfully taken, does not directly establish a reputation of marriage; yet it does the paternity of Sarah Steadman, which in the absence of any suspicion of illegitimacy under the circumstances, we hold to be sufficient, and the more especially as this question arises incidentally, the controversy not being between persons claiming under conflicting rights of heirship.

3d. The defendant attempts to protect his possession by showing an outstanding title in John C. Hamilton as purchaser under a tax sale, and also a title in himself as purchaser under a tax sale. Records in support of both these are produced, which upon examination are found to be so defective as to pass no right under the decisions of this State. We do not deem it necessary to enter into an investigation of the questions arising out of them, as they have been again and again adjudicated. The same objections exist to the records of both these sales that existed to that in the case of *Gardner & Mosely vs. Brown*, 1 Hump. Rep. 354, in which it was held, after mature and deliberate examination, that the sale was void. To that case we refer, as having settled every thing upon this point in the case under consideration.

Judgment affirmed.

**STANLEY vs. NELSON & DICKINSON.**

Where executions were issued on the same day the judgments were rendered by a Justice of the Peace, upon an insufficient affidavit, and were levied upon land and the same was sold by order of the County Court; it was held, that the sale was neither void or voidable, but valid.

This bill was filed in the Chancery Court at Sommerville, to enjoin proceedings in an action of ejectment instituted by Nelson & Dickinson against the complainant. The defendants demurred to the bill, and the demurrer was overruled by the presiding Chancellor, McCampbell.

The defendant appealed.

*Coe*, for complainant.

*Searcy*, for the defendants.

**TURLEY, J.** delivered the opinion of the court.

The bill charges that the complainant purchased of one Reuben Stanley, on the 25th of March, 1842, a tract of land in the county of Fayette, and received from him a deed of bargain and sale, which was duly proved and registered in the county on the first day of April, 1842; that on the 28th of March, 1842, the defendants obtained three several judgments against the said Reuben Stanley before a Justice of the Peace of Fayette county, and on the same day caused executions to be issued thereon, upon affidavit, stating that they were fearful of losing their debt unless this were done; that these executions were placed in the hands of a constable, and were by him levied on the same day of issuance, upon the land sold to the complainant, and returned to the County Court, where the land was ordered to be sold, which was afterwards done by the sheriff, and the defendants became the purchasers and received a deed of conveyance from him, and have thereupon commenced an action of ejectment, to turn the complainant out of possession. The bill alleges that the issuance of the executions under the circumstances was illegal, and that it was procured by the defendants with the knowledge of complainant's rights, and with

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the intention of depriving him of them, by obtaining a lien upon the land before the registration of his deed, and prays either that the purchase by the defendants, under the sheriff's sale, be declared void, and cancelled, or that complainant be permitted to redeem.

To this bill there is a demurrer, which was overruled by the Chancellor, and thereupon an appeal is prosecuted to this court.

The complainant does not occupy such a position as authorizes him to redeem the land, under the provisions of the statute in such cases made and provided: and the only question is, whether the execution sale, under which the defendants claim, can be cancelled by this court.

We think it cannot. The sale is neither void or voidable. The executions, it is true, were issued irregularly, the affidavit not being sufficient in law to authorize such prompt proceeding: but then it was an irregularity of which the defendant in the execution could alone complain or take advantage: having not thought proper to do so, or to stop the execution by a writ of *supersedeas*, but having permitted them to be executed, the sale under them is good.

The fact that the defendants had notice of complainant's right to the land at the time the executions were issued and at the date of their purchase, does not affect their conscience: they are creditors and not subsequent purchasers, and therefore not chargeable by notice, as are subsequent purchasers.

The decree of the Chancellor is therefore reversed, and the bill dismissed.

**MICHIE *et al.* vs. THE GOVERNOR, for the use of, &c.**

In covenant on a constable's bond, the breach was that a constable collected money from Davis, and failed to pay it over. The proof was, that he collected it from Davis and another. Held, that the breach was sufficiently proved.

This action was tried at the September term, 1843, of the Circuit Court of Fayette county, before Judge Dunlap and a jury of Fayette, and a verdict and judgment were rendered for the plaintiff, from which defendant appealed.

*H. G. Smith* and *J. C. Humphreys*, for plaintiffs in error. 1 Starkie, 434; *Bristow vs. Wright*, 665; 2 Starkie, 444.

*Potts*, for the defendant in error. 1 Chitty's Pl. 369, 402; 5 Taunt. 27; 4 M. & S. 349; 6 East. 437.

**TURLEY, J.** delivered the opinion of the court.

This is an action brought on the bond of a constable, to recover an amount of money collected by him and not paid over. The declaration is in the usual form. The breach assigned is, that the constable received of the plaintiffs, West & Atkinson, the promissory note for collection, executed by one Hugh Davis, for the sum of one hundred and sixty-three dollars; which note he, as constable, by virtue of process put in his hands, proceeded to collect, and did collect, together with all cost and charges, amounting to one hundred and sixty-four dollars and ninety cents debt, and thirteen dollars and eighty-four cents cost, all of which he failed to pay over as he is required by law. Pleas, covenants performed, payment, accord and satisfaction. Upon the trial, the plaintiff introduced, in evidence, an execution issued by Thomas B. Firth, a Justice of the Peace for Fayette county, commanding the said constable to collect of Hugh Davis and Thomas N. Giles the sum of 164 dollars and 90 cents debt and interest, and the cost, 13 dollars and 84 cents, to satisfy a judgment of the plaintiffs West & Atkinson; upon which was endorsed, in the hand writing of the constable, satisfied in full. The Judge charged the jury, that



[*Michie et al. vs. The Governor, for the use of, &c.*]

it was for them to determine whether the constable had collected the money of the plaintiffs, claimed in the declaration: if he did, they should find for the plaintiffs; which was accordingly done. Defendant moved for a new trial, which was refused, and a writ of error is prosecuted to this court. The question for our consideration is, whether the breach assigned is sufficiently proved. It is alleged, on behalf of the plaintiffs in error, that it is not; that the breach being assigned for the collection of money by process upon a note placed in a constable's hands, drawn by Hugh Davis, it should have been proved that the process read in evidence against Hugh Davis and Thomas N. Giles was issued upon a judgment rendered on the note described in the declaration; and this is sought to be assimilated to the case in which a plaintiff in setting out his right to sue in a declaration, describes it erroneously; as when a plaintiff in trespass claims title as tenant in fee, when he was only tenant for life or for years; in which case he is bound to prove his title as laid, although his true title would have supported the action. This similarity does not, in our opinion, exist. The same certainty is not required in assigning a breach that is in setting forth plaintiff's right to sue: his ground of action rests upon his right. If that be misdescribed, he must fail, because the description was necessary in order that the defendant might know what he had to combat; and to permit him to sue in one right and recover in another, would be to take the defendant by surprise; and therefore it has always been held, that if the description can be rejected as surplusage, it should be done; but otherwise, not. But the allegation of a breach is not thus strictly judged: all that ever can be required is, that the breach complained of be substantially set forth and substantially proved. In this case, the breach complained of, is the failure to pay over \$164 90 and cost, collected by defendant from Hugh Davis; and the proof shows the amount to have been collected from him and another. This is substantially sufficient, and we therefore affirm the judgment.

**THE STATE vs. THE LAGRANGE AND MEMPHIS RAIL ROAD.**

The legislature provided, that the State should subscribe for one half of the stock in all incorporated rail road or turnpike companies; and also provided, that the State should have a lien on the property of the company to the extent of money advanced by the State as a corporator, for the purpose of securing the payment of a similar amount by the other corporators. The State subscribed for one half of the stock of the LAGRANGE and MEMPHIS RAIL ROAD Company, and paid it. Held, that this lien attached to the property of the company, and that the property could not be seized by *J. fa.* at the instance of creditors, until the extinguishment of the lien by the payment of the stock.

This bill was filed in the Chancery Court at Sommerville, and was heard on bill and demurrer thereto, at the May term, 1843. The demurrer was sustained, and the bill ordered to be dismissed. From this decree the complainant appealed.

*Attorney General* and *H. G. Smith*, for the State.

*W. T. Brown*, for the defendant.

GREEN, J. delivered the opinion of the court.

The bill sets forth that the defendants have obtained various judgments against the LAGRANGE and MEMPHIS RAIL ROAD Company; that executions have been issued, and have been levied on the property of the company, consisting of a lot of cedar timber, three hundred and twenty-six tons of rail road iron, one locomotive engine, and nine rail road cars; that this property is subject to the lien reserved in favor of the State, by the acts of 1837-8, ch. 107, and 1839-40, ch. 101, until all the stock held by individuals shall be fully paid up, and that thirty-two thousand dollars of stock held by individuals is yet unpaid. Wherefore an injunction is prayed for, to restrain the sale of the said property, levied on as aforesaid by the defendants.

The injunction was granted, and the defendants appeared and demurred to the bill.

By the 24th section of the act of the 19th of January, 1838, it is enacted, "That the State of Tennessee shall have a lien on the entire works of said companies respectively, for the amount so paid in by the State, and all the profits, rents and tolls of

[The State vs. The Lagrange and Memphis Rail Road.]

said companies shall enure to the benefit of the State, until individual stockholders shall have paid their entire stock in said companies respectively." The act of 1839-40, in the proviso to the fifth section, declares, that "the State shall have a lien upon the private property of each stockholder, until the whole of said stockholders' stock is paid up: also, the State shall have a lien upon all the property of said company, including land owned and town sites purchased and donated, as herein provided for, as a security to the State that all the stock held by individuals in said company is good and solvent, and will be paid."

1st. The terms of these acts are very broad, and declare the existence of the lien in the most comprehensive language. But the defendants insist, that these acts were designated as an arrangement between the different corporators alone, and were not *intended* to operate against third persons.

We cannot so understand the language used by the legislature. It is certainly in terms as comprehensive as it could have been made; and the declared purpose and object of the law would be wholly defeated by the interpretation contended for.

If the private property of the stockholders may be seized by their creditors, and the property of the company may be taken and sold by their creditors, in what would the security to the State consist? Certainly the mere right of the State, as between it and the individual stockholders, would effect nothing, if the cars and locomotive engines, necessary for carrying on the business of the company, and the only means for obtaining the receipt of tolls, might be seized by its creditors and sold.

We cannot so understand these laws. Such a construction would alike do violence to the language and meaning of the legislature.

The assumption, that the State had no *power* to create this lien in its favor in the company, is wholly unfounded. It is neither supported by reason or authority.

The case of the *Bank of the United States vs. Planters' Bank of Georgia*, (9 Wheaton's Reports, 904,) has no application to the present question. The question in that case was, whether the Bank of Georgia could be sued, a sovereign state not liable

[*Raines vs. Jones et al.*]

to be sued, being a stockholder in a bank. The court decided that it might be sued; that a sovereign state becoming a stockholder, descended to the level of other stockholders, and did not, by its connection with them, elevate the corporation to the dignity and exemption of a sovereign state.

But *here*, the sovereign state, by its law making power, declares the existence of a lien upon the property of the company and of the other corporators, for its security. The legislature would have had the *power* in granting a charter of incorporation to private persons, or stockholders, to have given those whose stock was paid in a lien upon the property of the company, to secure the payment by the other stockholders; and shall it be said that the State has no power to enact a law in its own behalf, which it might have made in behalf of private citizens? Surely not.

The injunction must be allowed.

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*RAINES vs. JONES et al.*

1. Where a party attempted to make a formal tender, but was prevented from so doing by the refusal of the other party to remain till the money could be counted; it is held, that this was equivalent in legal effect to a tender.
2. Where a fact is charged in the bill and denied in the answer, to authorize a decree for complainant there must be two witnesses, or one witness and corroborating circumstances, sustaining the allegation of the bill. But before this rule applies, there must be a positive and circumstantial denial of the facts alledged in the bill.
3. Where the defendant admitted a tender, or conversations in regard thereto, in his answer, he could not, by a subsequent and amended answer, take back admissions.

This bill was filed in the Chancery Court at Huntingdon, by Raines against Jones & Gillespie, and having been continued from time to time, by reason of the incompetency of the Chancellor to try it, it was transferred to the Supreme Court. It was heard on bill, answer, replication and proof. All the facts are set forth in the opinion of the court.

*Gibbs and McLanahan*, for the complainant.

*Pavatt*, for the defendants.

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GREEN, J. delivered the opinion of the court.

This bill is brought to redeem two lots in the town of Winchester. The complainant alleges, that the lots were sold as his property, by virtue of a decree of the Supreme Court, and that the defendant Gillespie purchased the same, and then sold and conveyed the lots to the defendant Jones; that while Jones was claimant and owner of the lots, and before the expiration of two years from the date of said sale, he tendered the full amount bid by Gillespie and ten per cent thereon, as the law requires, to the said Jones, but that he refused to receive the same.

The answer of Jones to the original bill, "positively denies that a tender ever was made to him by the complainant, his agent, or friend, or *bona fide* creditor. Perhaps the brother of the said complainant, one Henry Raines, said to this respondent that he would redeem the property, or had the money to do it, but this respondent positively denies that the money to redeem the property ever was tendered to him by any one."

In his answer to the amended bill, Jones states, "that neither the complainant, nor his agent, nor his friend, nor any other person for him, ever tendered to respondent at any time the purchase money of the house and lots in dispute, or a single cent thereof, for the redemption of the said house and lots, or any part thereof. Henry A. Raines did say to this respondent, that he would redeem said house and lots if he had the money, but, as has been before stated, he never did make the tender, in any shape, manner or form."

The deposition of H. A. Raines states, that in November, 1836, he called on Jones and requested to meet him at the clerk's office in the town of Winchester the next day, and he would pay the amount of money it would take to redeem the lots for his brother, R. P. Raines. He met Jones in front of the office next day, and asked him to go into the office and he would pay the amount of money it would take to redeem said lots. Jones replied, that he had paid twenty-five per cent for the money to purchase the lots, and if witness would pay the same he could have the lots. Witness said he had nothing to

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do with his contract, and said to him: "I now make you a tender of the full amount of money it takes to redeem said lots, having the specie then in my hands." Jones refused to receive the money unless the twenty-five per cent he had given was also paid, and abruptly turned off.

1st. The first question is, whether the witness proves such acts as amount to a tender, or was he excused for failing to make a tender by the conduct of the defendant Jones?

The witness and Jones were in front of the clerk's office, and the witness having in his hands the specie, told Jones that he then made him a tender of it. Jones refused to receive it, unless a condition he had no right to make were complied with, and he abruptly turned off.

We think the agent of the complainant did all the law required him to do. If a party can prevent a formal tender by refusing to remain until the money can be counted and offered to him, and then successfully insist that no tender was made, it would be easy effectually to prevent any tender from being made.

2d. The next enquiry is, can the court decree for the complainant upon the testimony of the witness alone.

The rule in courts of chancery is, that when a fact charged in the bill is denied in the answer, to authorize a decree the bill must be supported by two witnesses, or one witness with corroborating circumstances. But we think the character of the denial is not such in this case as to invoke the application of this rule.

The answer of the original bill admits that H. A. Raines said to the defendant, that he would redeem, or had the money to redeem; but denies that the money was tendered to him. Now, this is not a direct, but evasive denial of the tender. Instead of standing opposed to the proof of the witness, it is in corroboration of it. If the answer had denied positively and circumstantially the tender, and another witness proved that he saw Jones and the witness Raines in conversation in relation to the redemption of the lots, and heard Raines tell Jones that he would redeem the property, or had the money to redeem, such evidence would constitute a circumstance strongly con-

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firmatory of the testimony of H. A. Raines. And yet Jones's answer admits Raines used this language. Surely this admission should have as much weight as if the facts had been proved by a witness; especially as they tend to weaken his denial, and show that he must have placed that denial upon his conception as to the facts that constitute a legal tender. It is true, in the answer to the amended bill the denial of a tender is more directly and strongly made; but the admissions in the first answer are not and could not have been taken back. They stand as though the two answers were but one, and must have all the force we have ascribed to them.

We think the complainant is entitled to redeem this property upon paying into court the sum which may be found due on the coming in of the master's report. The master will state an account, allowing the complainant for the rent of the lots from the time the tender was made, up to the time of making his report; and charging him with the sum he was required to pay at the time the tender was made, and interest thereon to this time.

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TRIGG vs. HALLY.

Trigg covenanted to deliver to Hally "his growing crop of cotton in good order, put up in Kentucky or India bagging, well and sufficiently tied with rope, and said cotton to be well handled." Held, that the covenant did not bind Trigg by absolute engagement to deliver cotton free from stain and of fair quality. It bound him to use the utmost care and attention in picking, ginning and baling the cotton, but did not guaranty against the inevitable casualties of the seasons.

Trigg commenced this action of trespass on the case in the Circuit Court of Fayette county, against Hally, on a protested bill of exchange drawn by Hally in his favor, and also for cotton sold and delivered. Plea, non-assumpsit, and issue.

It was submitted to a jury of Fayette county, Dunlap, Judge, presiding, at the September term, 1843.

In addition to the statement of facts which is made in the opinion of the court, it was shown that Hally made an agreement for the purchase of the entire cotton crop which should be

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made by Trigg on a plantation on Red river, in the State of Arkansas, in the year 1841. The cotton was to be delivered at the plantation on the first day of November and on the first day of January, *in good order, to be put up in Kentucky or India bagging, to be well and sufficiently tied with rope and to be well handled.* Hally agreed to give him \$8 50 per hundred weight. Hally constituted Titus his agent to receive the cotton and execute the contract; and Titus, a resident of Memphis, Tenn. arrived at the plantation to receive the cotton about the first day of November, 1841, and did receive without objection 210 bales of cotton, and proceeded with it to New Orleans. The cotton was there delivered, by agreement of Trigg and Hally, to Fearn & Donnegan, commission merchants, for sale. On the receipt of the cotton, the commission house informed Trigg, that the crop was received and that a large portion of it was an inferior article. Trigg agreed with Hally that the sale might be postponed for better prices, provided it should not be postponed beyond the first day of June, 1842. Hally went to New Orleans, examined the cotton, complained that it was not the article he had a right to expect, declared that his agent had not done him justice in receiving the cotton, ordered a postponement of the sale till further advices, and on his return to Memphis addressed a letter to Trigg, informing him that he had not complied with the contract, declining all control over the cotton or ownership of it, and notifying Trigg not to look to him for the price.

Titus addressed a letter from Red river plantation to Hally, saying that there was a good deal of mud and trash in the cotton: the season was rainy, and that part of the country exceedingly muddy; a considerable portion of the cotton was stained with mud, had much leaf in it and some of it was injured in the staple by having remained wet too long, but what portion thereof does not appear.

The cotton was held up till the first of June, and then sold for the best price which could be then procured, which was \$6 and 3-8 per hundred, and the proceeds applied to the satisfaction of the bill. Whilst the first quality of cotton stood firm from February till June, the inferior article had somewhat declined.



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No objection seems to have been taken to the baling, rope, &c.

Much testimony was taken for the purpose of showing the meaning of terms "in good order and well handled," and which it is not necessary here to set forth.

Under the charge of the Judge, which is set forth in the opinion of the court, a verdict and judgment were rendered in favor of the defendant, from which he appealed in error.

The court charged the jury, that a receipt of the cotton and drawing of the bill by agent, was *prima facie* proof that the plaintiff had complied with his part of the contract; that defendant, when he discovered the defect in the cotton, had a right to return the article or sell it, and in an action for the consideration money, give in evidence the quality of the article. If he complied with his contract, he was entitled to a recovery; otherwise, not. He then construed the covenant, which part of the charge will be seen in the opinion.

*Brown*, for the plaintiff in error.

*Coe*, for the defendant in error.

GREEN, J. delivered the opinion of the court.

The plaintiff and defendant entered into the following contract:

"Know all men by these presents, that I, Creed H. Hally, of Fayette county, Tennessee, have this day agreed and do bind myself to take of John Trigg the whole of his present growing crop of cotton in his farm on Red river, to consist of four hundred bales, more or less; said cotton to be delivered at said Trigg's cotton shed in good order, to be put in Kentucky or India bagging, well and sufficiently tied with rope; said cotton to be handled well, and delivered to the said Hally on the 1st day of November, whatever is then ready; also, on the first day of January whatever is then ready, and the balance to be delivered in one lot whenever it is all ready: said cotton to be ensured and shipped at the risk of the said Hally, to Anthony H. Brown

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or any other responsible house in New Orleans; and said Hally or his agent is to give, on the delivery of the said cotton as above specified, (at Trigg's cotton shed,) his bill payable at New Orleans, thirty days after the receipt of said shipment at New Orleans, at eight dollars and fifty cents per hundred pounds, payable in New Orleans funds. Dated at Memphis, Tennessee, the twenty-second day of May, one thousand eight hundred and forty-one. For the faithful performance of the above obligation, we mutually bind ourselves in the penal bond of ten thousand dollars, to be well and truly paid, should either party fail to comply with the above contract.

C. P. HALLY,  
JOHN TRIGG.

Witness, W. I. Woods."

The defendant Hally appointed R. E. Titus his agent, to go to Trigg's plantation on Red river, to receive and ship the cotton for him. Titus received the whole crop, amounting to two hundred and ten bales, by the first of January, 1842, and shipped the same to New Orleans, on account of his principal. He also drew a bill for Hally, as his agent, on Lockhart, Fearne & Donnegan, of New Orleans, in favor of Trigg, for 8847 dollars and 65 cents, the price of the cotton at \$8 50 per hundred pounds, the rate agreed on by the contract.

By subsequent agreement between Hally and Trigg, the cotton was shipped to Lockhart, Fearne & Donnegan, instead of Anthony H. Brown, as stipulated in the contract: and it was also agreed, that the cotton in New Orleans should be postponed, and that the bill in favor of Trigg should be held up. The cotton was sold in June for 6 and 5-8 cents per pound—making of net proceeds only 5331 dollars and 6 cents, which sum was credited on the bill in favor of Trigg. This suit is brought to recover the balance due on the bill; and the declaration contains several counts, presenting the plaintiff's claim upon the bill and upon the original contract of sale. The defendant insisted that the cotton was stained with dirt,—injured by the weather before it was gathered, and altogether an inferior article to that which he had a right to demand under the contract. The plaintiff contended, that the cotton was in good order, and

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well handled, and that if its quality was inferior, it was the result of the rainy season, that rendered it impossible to put it up in better condition.

There was much evidence before the jury upon these points, and under the charge of the court a verdict was rendered for the defendant.

The plaintiff excepted to the charge of the Judge, and appealed to this court.

Before we examine the charge of the court, it will be proper to state the contract of the parties, as it must be construed and understood.

There is no doubt, but that if the contract had been made abstractly for 210 bales of cotton "in good order and handled well," this stipulation would have bound the party to have delivered an article, not only well ginned and baled, dry and in good condition, but of a fair quality. But in construing *this* contract, we must not confine ourselves to the stipulations, that it must be in *good order and handled well*. The *whole* contract must be considered.

In the first place, it is an agreement for the purchase of the crop *then growing* on a specified plantation. In the next place, it is understood that the crop is to be gathered during the season ranging from August to February; for it is stipulated, that the defendant is to receive whatever may be ready the first day of November, and whatever may be ready on the first day of January, and the balance in one lot whenever it may be ready.

The stipulations, therefore, that the cotton is to be in *good order and well handled*, have regard to the whole of this specified crop, as it might with proper care and diligence be gathered during the season, handled well in picking out, ginning and baling, and then preserved from the weather so as to be delivered in good order.

It was not in the contemplation of the parties, that Trigg should engage a large extra force, so that his cotton should be all gathered early in the season, and thereby escape entirely the effect of the autumnal and winter rains, and therefore it could not have been in their contemplation, that the whole of the cotton would be free from stain and dirt: such a state of things can be

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predicated of no large planter's entire crop any season; and as they were contracting in relation to an entire crop of a given season, they must be understood as having in view these known facts, that part of the crop would be of the first quality, part only fair, and part inferior. What would be the proportion of each quality they could not foresee; which would depend upon the perfection of the crop, in its growth and maturity; much upon the character of the weather during the coming fall and winter, and much upon the manner in which it should be handled. As to the two former causes that might affect it, the purchaser took the risk: but as to the last, depending on human agency, he takes a stipulation from the vendor. We think, therefore, if it had been shown that Trigg handled the cotton well, that is, if he was careful in picking it out, as free from leaf and dirt as the nature of the season would enable him to get it, and it was kept dry and nicely handled in ginning and baling, and was then delivered in good order, the defendant would be bound for the price agreed on. But if he failed in any of these particulars, and in consequence of such failure the lot of cotton was of inferior quality, the defendant would be entitled to a diminution of the price, to the extent of the loss experienced by reason of such negligence of the plaintiff.

The only question now is, did the honorable court below leave the case to the jury with a proper exposition of the contract; and we think he did not. He told the jury, to be sure, that if the plaintiff had complied with his contract, he had a right to recover; but he said, "If you should be of opinion that the cotton was not in the order and handled as agreed by the parties, the defendant would not be bound to take it, although the rains had made it impracticable for the plaintiff to put it in better order, or handle it better than it was. The defendant was entitled to have the cotton in the order and handled as contracted for."

His honor also refused upon the application of the plaintiff to charge, "that if the plaintiff had put up his cotton in as good order and handled it as well as human agency could do, owing to the season, it would be a compliance with his contract." At the request of the defendant, his honor charged, "that the law

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as applicable to this case is, that where a party by his own contract engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies and exempt himself from responsibility in certain events, and in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident, or other contingency, although not foreseen by or within the control of the party." In these several extracts from the charge of the court, we think his honor was manifestly laboring under a misapprehension of the meaning and true construction of the contract before him.

He evidently regarded the stipulation, that the cotton should be in good order and well handled to amount to an absolute engagement that it should be of fair quality and free from stain. In this we have seen he failed to give due effect to all the terms of the contract. For unquestionably, the last picking might have been as well handled as the first; and as the parties were contracting about the entire crop then growing, to be gathered through various seasons of the year, we are to suppose that they so understood the meaning of the words.

The extract last quoted from the charge, although true as an abstract principle, yet has no application to this case; and in giving it such application, the jury were misled and the court erred.

The other two extracts from the charge evidently show a misconception of the meaning of the contract, and were calculated to mislead the jury.

The court failed to place before the jury the true question between the parties, that is, did Trigg handle the cotton well, in picking, ginning and baling, and thereby make it as good an article as the utmost care and attention would have enabled him to do? If the season was deficient, his attention and diligence should have been redoubled.

Reverse the judgment and remand the case.

**PAYNE vs. PAYNE.**

A wife is entitled to a divorce where the conduct of her husband is such, that it is unsafe for her to live with him; or where he is in the habit of offering such indignities to her as render her condition intolerable.

This bill was filed by Eliza Payne against W. L. Payne, in the Chancery Court at Sommerville, for a divorce and for alimony.

W. L. Payne had several children by a previous wife, and a considerable estate when he married the complainant Eliza. She had also some estate, consisting of slaves and other property. They had three children. The complainant in consequence of continued personal indignities and abuse, abandoned the defendant and filed this bill.

The defendant answered, and a replication being filed, much proof was taken in the case, the substance of which is set forth in the opinion of the court. It was heard on bill, answer, replication and proof. The presiding Chancellor, McCambell, dismissed the bill. The complainant appealed.

*Wm. T. Brown*, for the complainant.

No person appeared for the defendant.

**GREEN, J.** delivered the opinion of the court.

This is a bill for divorce, alleging that the defendant has been guilty of gross abuse of the complainant, and of personal violence; so that her situation was rendered intolerable, compelling her to withdraw from his society.

The defendant's answer denies the use of abusive language, or that he has been guilty of personal violence towards the complainant, except that in one instance, when greatly irritated, he slapped her face with his hand.

There is much evidence in the record, in relation to the conduct of the parties towards each other; but it is unnecessary to analyze the proof particularly, with a view to arrive at a correct conclusion in the case. One or two of the witnesses speak of the complainant as high-tempered, and doubtless, under the

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influence of the irritating indignities which the defendant was in the habit of inflicting upon her, she sometimes felt and exhibited resentment. But the great body of testimony from witnesses who have known her from early girlhood, establishes for the complainant a most exemplary character. Ladies of the highest respectability, her early companions, say she was sensible, well informed, and most amiable in her disposition and temper. Gentlemen in the first walks in society, in whose families she was intimate during her cohabitation with the defendant, give her the same character. Both parties were members of the Methodist Church. The ministers of that church, and other members, speak of the complainant's Christian character in the highest terms; but of that of the defendant in equivocal language. The defendant was peevish and ill natured, given to scolding and fault-finding. In an interview with the complainant, after the separation, he admitted, in presence of Mr. Littlejohn, that he had threatened to drive complainant from his house, but that he would have her debts to pay; and that he was in the habit of using such language to her, as is not usual to be addressed to slaves. To Mr. L. P. Williamson, he admitted he had slapped her, and when charged with having also choked her, he evaded, but did not deny it. To Mr. James M. Williamson, he admitted, that he had, at family devotion, prayed the Lord to deliver him from his wife, in whatever way he might think best; and this he justified to Mr. Williamson saying the prayer was right. As to the indignities of language, and personal violence, he excused himself by alleging, that he was in a passion. But as to the prayer, infinitely the greatest indignity of them all, to a pious and sensible mind, he had the audacity not only to avow the fact, but to justify it. If, as there is reason to suppose from his attempt at justification, he really felt the desire expressed in his prayer, the safety of the complainant was in jeopardy while cohabiting with him. He sets up as matter of defence, his unfortunately irritable and ungovernable temper. If there was a strong desire to get rid of his wife, obtaining utterance in prayer, this ungovernable temper might engage his own hand in the execution of his wish. We all know how much the judgment is perverted and the con-

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science weakened, under the influence of a strong desire to sin; and in this case, such an influence might soon make the thought father to the deed. But if no such settled feeling existed, and the prayer was only intended for the ear of his wife, with a view to irritate and wound her feelings, language is wanting to express the indignant reprobation which every virtuous mind must feel, at the brutality, the hypocrisy, and the profanity of the act. He is a member of the church; his wife is also a member, most exemplary and pious. She surrounds the family altar as a matter of duty and pious privilege, while he, profanely calling upon God, insults her, by expressing his wish that she should be removed from him; and this she is compelled to hear, causing her own feelings, which would have been employed in pious devotion, to be outraged and insulted. I know not what course of conduct would render the situation of an educated, sensitive, and polished lady intolerable, if that adopted by this defendant shall be considered as inadequate to effect such an end. He is in the habit of using language to her, which a gentleman will not employ to his slaves; he threatens to drive her from his house; he slaps and chokes her; and, at the family altar, in her presence he prays God to deliver him from her. We think she would ill deserve the character of refinement, sensibility, and lady-like feeling, which the witnesses give her, if she did not feel that to remain in his house, and endure all this, was intolerable.

By the act of 1841-2, ch. 133, the court is authorized to decree a divorce from the bonds of matrimony in all cases, where by the act of 1835 a divorce was authorized from bed and board; and we think, upon all the facts of this case, the complainant is entitled to such a decree.

Let the Master report what property the defendant received by his marriage with the complainant, and which he yet owns, and let the whole of it be vested in a trustee, for the use and support of the complainant and her children.

Reverse the decree of the Chancellor, and decree as above directed.



## GARDNER vs. BRIGHT.

1. Where a person is the owner of a small tract, under two hundred acres, by entry, grant or deed, he may extend it by entry to two hundred acres. The acts of assembly authorizing such extension entries do not require an actual residence of the party on the small tract.
2. Where a person tendered a location to the entry-taker, which the entry-taker illegally refused to receive; this did not constitute the applicant the owner of the land proposed to be entered, so as to authorize an extension entry. He must be the owner by the completion of the steps necessary to constitute a valid entry before he can, by *mandamus*, compel the entry-taker to receive this extension entry.

This petition was filed in the Circuit Court of Obion county, and was tried by Judge Harris, at the February term, 1844. He ordered a peremptory *mandamus* to the entry-taker as to the small tract proposed to be entered, and dismissed the petition as to the extension entry.

*Totten and Rains*, for the petitioner.

*Gardner*, for the defendant.

GREEN, J. delivered the opinion of the court.

This petition for a *mandamus* was filed by Bright to compel the entry-taker to receive and record an entry for one acre of land in Obion county, tendered by Bright on the 11th day of February, 1842; and also an extension entry for 199 acres, entered at the same time.

Gardner who defends for the entry-taker, insists that he is entitled to the land by virtue of entry made by him on a valid warrant the 4th June, 1842, because the relator, Bright, was not an actual settler on the one acre, at the time he offered his entry; and that the acts of 1829, 1835, 1837, 1839 and 1842, contemplated an actual residence on the small tracts, which were by these laws authorized to be extended.

The cause was before this court at its last term, when it was adjudged, that the acts of assembly do not require a party to be in actual occupation of his small tract, but that if he is the owner by his entry, grant or deed, he may extend it to two hundred acres, and, therefore, the relator was entitled to enter the

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one acre as proposed by him. The cause was remanded, (inadvertently,) and the Circuit Court rendered the judgment indicated in the opinion of this court; that a peremptory *mandamus* issue to the entry-taker of Obion county to receive the one acre entry; and that the petition be dismissed as to the 199 acre extension entry. From this judgment the relator appealed again to this court.

In reviewing the grounds of the opinion which was given at the last term, we are well satisfied with the conclusion to which we then arrived. We do not indicate that the relator will not be entitled to make the extension of 199 acres, after he shall have made the one acre entry. But we cannot regard him as owner of the one acre by entry, until his entry shall be made. Certainly having tendered the one acre entry, which has been refused by the entry-taker, does not make him in point of fact an owner of the land by entry. He had no right to enter the land by extension entry, until he had become the owner of the one acre. The acts of assembly, authorizing the extension, predicate the right to do so, expressly on such ownership. Indeed the very word employed shows, that the ownership must exist. What would there be to extend, if the party previously owned nothing? Until, therefore, the entry for the one acre shall have been received, the entry-taker is guilty of no wrong in refusing the extension entry demanded. When that shall occur he must act upon the facts and the law, and will be subject to legal control if he fail in his duty.

Affirm the judgment.

**HOUSTON, Chairman, vs. DOUGHERTY'S sureties.**

A judgment by motion cannot be rendered against the sureties of the Trustee alone for money by him collected and not paid over, though the principal be dead.

This motion, by the Chairman of the County Court of Perry county against the sureties of the former Trustee of the county, was tried by Judge Totten, at the February term, 1843. He gave judgment in favor of the defendants, from which the Chairman appealed in error.

*Attorney General*, for the plaintiff in error.

*Huntsman and Scurlock*, for the defendants in error.

TURLEY, J. delivered the opinion of the court.

In this case the Chairman of the County Court of Perry county applied to the Judge of the Circuit Court, for a judgment, on motion, against the defendants, James Dougherty and John C. Yarbrough, as sureties of Thomas J. Dougherty, deceased, former Trustee of said county, for the revenue of 1838, 1839, by him collected and not paid over.

Upon the hearing it appeared, that at the January term, 1841, of the County Court of Perry, J. L. Houston and Daniel Funderburk were appointed Commissioners to settle with the county officers for the year 1841. Under this appointment they returned, that they found the Trustee indebted to the county in the sum of \$1712 58 for revenue collected for the years 1838, 1839; and this is the amount for which the Circuit Court was asked to give judgment against his sureties. The judgment was refused; and, thereupon, a writ of error is prosecuted by the Chairman to this court.

We think the refusal of the judgment in the court below was correct, for two reasons:

1st. The Commissioners were appointed to settle with the Trustee for the year 1841. Under this appointment they had no power to examine his accounts for the years 1838, 1839, and make a report thereon; it was, therefore, no evidence upon which to base the motion.

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2d. There is no authority given by which a judgment can be rendered, on motion, against the sureties of Trustee, without also giving judgment against him at the same time. The act of 1823, chap. 49, sec. 24, gives a judgment on motion in the Circuit Court against him and his sureties, but not against the sureties, alone. And we have held in the case of *Rice and others vs. H. & J. Kirkman*, 3 Hump. R. 415, that the judgment must be taken against all those against whom it is jointly given, unless in the case of the sureties, one of them be dead, when judgment may be taken against the survivors; but this does not apply to the death of the principal.

We, therefore, affirm the judgment of the Circuit Court.

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#### BELEW vs. CLARK.

1. Where there is a sale of a slave by bill of sale, with warranty of soundness of body or mind, a Court of Chancery has no jurisdiction, unless the warranty be fraudulent. In the absence of fraud, the remedy is by action at law on the warranty.
2. Where the intellect of a slave is warranted to be sound, and the fact of soundness is doubtful, a Court of Chancery has no jurisdiction. The question of fact in such case, must be submitted to a jury.
3. The complainant had purchased a slave with warranty of soundness of intellect, and had himself offered to sell such slave, representing her intellect to be sound: Held, that he was not precluded by such declaration from proving her intellect to be unsound, yet his declarations after his purchase, that she was sound of mind, were strong evidence of the soundness of her intellect.

This bill was filed in the Chancery Court at Trenton, by Belew against Clark, for the purpose of rescinding a contract for the purchase of a slave, and to enjoin the collection of a note given therefor, on the ground of a fraudulent warranty of soundness of mind.

On the 23d day of February, 1839, Hurt sold and delivered the negro girl, Martha, to Clark. The bill of sale represented her to be about six years of age, and warranted her to be sound. Some conversation occurred between them at the time of the sale, in reference to her mind. Hurt said that she had an obstinate, mulish, sullen temper, but that she was of sound mind so far as he knew; he had owned her about four years; that at

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times her actions indicated an absence of intellect, and that at others she seemed to have as much as usual with those who had no better tutoring; one of her legs had been broken, and her toes were frostbitten. The bill of sale expressed the receipt of \$250 as the purchase money. On the 22d day of April, 1829, Clark sold her to Belew, the complainant. The bill of sale represented her as about six years of age, the consideration to be three hundred dollars, and warranted her "to be sound." The bill charges the consideration to have been three hundred and fifty dollars. The answer admits that it was nominally that sum, but asserts, that it was paid partly in property at a high valuation, and that it was really worth not more than three hundred dollars.

The bill charges, that she was absolutely an idiot, and of no value; that this was known to the defendant at the time of the sale, and that he fraudulently represented her to be of sound mind, &c. The answer admits that he represented her to possess a sound mind, but that he stated that she was not sprightly—that she was dull—that one of her legs had been broken, and that her feet had been frost bitten, and that her dullness and refusal to talk, &c. &c., resulted from her having been badly treated, and from want of tutoring, &c.

There was much testimony taken of a conflicting character; many witnesses swearing that she was of unsound mind, and absolutely valueless, whilst the rest regarded her as dull, stupid, and of feeble intellect, but with enough to understand what she was told, and to do all ordinary duties that might be reasonably assigned to a child of her age.

Two physicians were required by complainant to examine the girl, with a view to ascertain and report whether she was an idiot or not. They made a partial examination from two to four hours, and stated as the result of their investigation, that she was not absolutely destitute of intellect, but was dull and stupid, to an extent bordering on idiocy, and that her capacity to acquire ideas or remember, was very limited, and that she was of very little value. They stated on cross examination, that a state of idiocy might be produced by disease, or by

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illtreatment and injuries inflicted; but that the girl seemed to be in good health.

It further appeared, that the complainant kept the slave for nearly a year; represented her to other persons as sound, and had authorized her to be sold at auction as sound in body and mind.

It came on to be tried on bill, answer, replication and proof, at the March term, 1843. McCambell, the presiding Chancellor, believing that the fraudulent warranty had not been established, dismissed the bill. Complainant appealed.

*Totten*, for the complainant.

*McLanahan*, for the defendant.

TURLEY, J. delivered the opinion of the court.

This is a bill filed to rescind a contract for the sale of a negro girl, slave, sold by the defendant to the complainant, upon the alleged ground of a fraudulent warranty of soundness on the part of the vendor.

It appears that the negro sold, was a girl, about six years old; that the contract was made on the 22d day of April, 1839, and a bill of sale executed by the defendant, in which is contained a warranty of title and soundness.

The bill was filed on the 2d day of March, 1841, and charges, that the slave sold was of imbecile intellect, amounting to idiocy, or so nearly so, as to render her valueless, and a charge and burden upon the vendee, which was known to the vendor at the time of the sale, and the fact fraudulently withheld and misrepresented by him. All this the answer expressly denies.

There is much proof taken, both by the complainant and defendant, upon the points in controversy between them, viz, the soundness of the intellect of the slave, and the fraudulent warranty thereof.

We do not deem it necessary to enter into a minute investigation of the testimony adduced on the part of the prosecution

[Belew vs. Clark.]

and defence: it is various if not contradictory, and under the circumstances of the case, leaves it, in our opinion, doubtful, whether the intellect of the slave be of such a character as is warranted by the defendant; and in such case, the party claiming to be agrieved, must be left to his remedy if he have any at law.

The different grades of intellect being so various from the highest to the lowest, the law does not, as it cannot, in controversies of this kind, weigh and pronounce how much or how little of it must exist to constitute a performance or breach of the warranty. The want of intellect must be of such a character as disqualifies from the performance of the ordinary duties of life, and renders the person afflicted therewith an irresponsible agent. This we cannot at present say is the condition of the slave sold to the complainant by the defendant.

The immature age, the nature of instruction received and the quantum of intellect (moderate as it is) displayed by the girl, all prevent the court from saying, that she is devoid of intellect to such an extent as to entitle the complainant to a rescision of his contract. The developement of intellect varies as to time, and is materially dependent upon the amount of instruction received, and the intelligence and habits of associates. Therefore independent of a natural difference in the strength of mind in different individuals, a precocity of one may be forced by culture, and an advancement of another hindered and delayed by the ignorance and incapability of those to whom the care of its early years is entrusted.

In the case under consideration, the slave was sold at the very immature age of six years. She had been brought up to that period altogether with negroes, having had little or no communication whatever with white persons, and of course her means of instruction must have been exceedingly limited, and a consequent shyness of manners in an intercourse with strangers was to be expected; and to this may, in all probability, be attributed all the conduct which the different witnesses have testified to as evidence of want of sufficient natural capacity.

The individual who sold the girl to the defendant, seems not to have supposed her deficient in this respect; but attributed

[Below vs. Clark.]

her apparent deficiency to the manner in which she had been brought up, and to obstinacy or mulishness, as he called it, and so informed the defendant, and the defendant so informed the complainant. And in addition to all this the complainant kept possession of her for nearly two years before filing this bill, and in the interim, on different occasions, proposed to sell her to others, and represented her as sound. Now, it is true that these representations do not conclude him from his remedy against the defendant, if he were imposed upon by his fraudulent warranty. Yet they are evidence against him, and entitled to weight upon the question of soundness of her intellect; and it is with rather a bad grace that he attempt to protect himself from their influence, by stating them to have been untrue.

But if the court felt that it was warranted by the proof, in finding that there was a deficiency in intellect in the slave, amounting to idiocy, it still would not be enabled to grant the relief sought by the complainant; for there is no satisfactory proof that this warranty of soundness, if untrue, was fraudulently made, which we have held to be necessary to give a Court of Chancery jurisdiction; the remedy, in absence of fraud, being at law upon the warranty.

We, therefore, affirm the decree of the Chancellor, but under all the circumstances of the case, dismiss the bill without prejudice to the complainant's right to sue at law, if, upon a further developement of facts in relation to the subject, he should think proper so to do.



**FOWLKS vs. LONG.**

In an action for slander the defendant pleaded justification, and after the testimony was submitted to the jury the defendant moved the court to amend his plea of justification, so as to embrace any speaking of the words imputed before action brought. The defendant insisted that the amendment should be allowed only on condition of a mistrial and continuance. The court allowed the amendment without the condition: Held, that this was erroneous. The amendment should have been allowed, a mistrial entered, and the cause continued.

Fowlks sued Long in the Circuit Court of Obion county, for defamatory words spoken of him. The declaration avers, that plaintiff, Fowlks, filed his petition in the Federal District Court at Jackson, on the 21st day of March, 1842, for the purpose of being declared a bankrupt, and obtaining a discharge from his debts, and that his petition was duly sworn to, and that the defendant charged him with having committed wilful and corrupt perjury in swearing to the said petition, and the accompanying schedule of his effects, &c.

The defendant pleaded: 1st. Not guilty. 2d. Statute of limitations, and 3d. That on the 22d day of March, 1842, in the county of Obion, the plaintiff filed his petition in bankruptcy in the District Federal Court for West Tennessee, held at Jackson, together with an inventory of the property, rights and credits of him the said plaintiff, of every kind and description, which inventory the plaintiff swore was true to the best of his knowledge and belief; whereas, in truth and in fact, said inventory was not true, and did not contain the property, rights and credits of every kind and description of him the said plaintiff; in this, that it did not contain a note on William Bond and James Holomon for \$100, nor a two horse wagon, nor two pistols, nor a tract of land of 150 acres, lying in Obion county, nor all of his hogs, or horses, or cattle, nor sundry notes, accounts and judgments due him the said plaintiff.

And that the said plaintiff "did thereby, in swearing to said petition in bankruptcy and inventory aforesaid, on the 22d day of March, 1842, falsely, wilfully, and corruptly commit wilful and corrupt perjury; wherefore, the said defendant, after the filing of said petition and inventory, and before the filing of any amended or supplemental petition or inventory, spoke and

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published of and concerning the plaintiff, the words charged in the declaration."

Issue was taken on these pleas, and the case was submitted to a jury at the October term, 1843, Harris, Judge, presiding.

In the progress of the trial the plaintiff moved the court to amend his declaration, by inserting in each count thereof the venue. This motion prevailed, and the amendment was ordered. In the further progress of the cause, after all the testimony had been heard, and all the arguments of counsel had been heard, except the concluding argument on behalf of the plaintiff, the counsel for the plaintiff took the following position, to wit: that the defendant's plea only justified the speaking the words after the filing the first inventory on the 22d March, 1842, and before the filing of the supplemental inventory on 3d of August, 1842, and that as the proof showed that the words were spoken after the filing of the supplemental schedule, the defendant could not under the plea justify speaking such words.

The defendant's counsel then moved the court to amend the plea by striking out of it the following words; "and before the filing of the supplemental schedule," so as to make the plea broad enough to cover the speaking of the words charged, at any time after the 22d March, 1842. To the allowance of this amendment the plaintiff objected, but the court overruled the objection and ordered the amendment. The plaintiff then moved the court that a mistrial be entered and the cause continued, which was objected to by the defendant, but the words charged in the declaration having been fully proven by the plaintiff to have been spoken after the filing of the supplemental schedule, and proof in regard to the truth of the same having been fully heard without objection, the court was of the opinion, that the whole transaction was fairly before the jury, and overruled the motion to which the defendant excepted.

The jury rendered a verdict in favor of the defendant. A motion for a new trial was made and overruled, and plaintiff appealed. The testimony was not brought up.

*Fitzgerald and Rains*, for the plaintiff.

*Totten and Gibbs*, for the defendant.

[Fowles vs. Long.]

REES, J. delivered the opinion of the court.

The plaintiff was a petitioner and applicant for the benefit of the bankrupt law of the United States, before the District Federal Court for West Tennessee; and this action is brought against the defendant for imputing to the plaintiff perjury, in taking the oath which verified the schedule accompanying the petition. The petition and schedule were filed in May, 1842, and in September of the same year, there was filed a supplemental or amended schedule.

The defendant pleaded three pleas, namely, the general issue, the statute of limitation, and a special plea of justification. The last plea alleged, that the plaintiff was guilty of perjury in the oath verifying the first schedule; and specified the omission of property and credits in that schedule, and averred, that the words spoken by him of the defendant, and therein justified, were spoken before the filing of the supplemental or amended schedule. Upon all three pleas, issue was taken.

Upon the trial of the case, after all the proof had been heard, and after the argument of counsel to the jury had been commenced and nearly concluded, the counsel for the plaintiff insisted, that having proved the words stated in the declaration, to have been spoken after the time of filing the supplemental or amended schedule, the words so spoken were not embraced by the very terms of the plea, and were without justification. Thereupon, the defendant's counsel moved the court, that he be permitted so to amend the plea of justification, as to make it general in its terms, and so as to embrace any speaking of the words in the declaration set forth, that might have taken place before the bringing of the action. This was opposed altogether by the plaintiff's counsel; and if such leave was given, it was insisted by them, it should be done on the condition of the defendant's consenting to a mistrial and continuing the cause. But the objection was overruled in both particulars by the court. The amendment was permitted, the case proceeded, and a verdict was rendered in favor of the defendant.

The only question here is, whether the Circuit Court, in permitting the amendment in question, without annexing thereto

[*Baker vs. Barfield.*]

as a condition the continuance of the cause, acted erroneously. We have manifested in many cases the reluctance with which this court will enter upon the delicate and difficult task of supervising and controlling the discretion of the Circuit Judge in questions of practice relating to the conduct and management of cases on trial before him. For obviously the point of view from which he surveys all such questions is more favorable than our own for a full and just perception of what it may be right and proper to do. But in this case, from the state of the pleadings as it existed before the trial, we are enabled to perceive, that if the plaintiff and his counsel knew that they could prove the actionable words to have been spoken after the filing of the second schedule, they were as secure in their preparations for the trial, if they chose to make the defence, as if no plea whatever of justification had been filed. And although the Circuit Judge might have thought, from what appeared before him, that this preparation was in fact made upon a contrary supposition, he had no right judicially to believe so; and although the amendment was proper in itself, he should by all means have allowed it only upon the condition of continuing the cause.

Let the judgment be reversed, the cause be remanded, and a new trial be had in the case.

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#### BAKER vs. BARFIELD.

A decree will not be made in favor of the complainant, where the allegations of the bill, which are denied by the answer, is supported by the testimony of one witness only without any corroborating circumstances.

This case was tried on bill, answer, replication and proof at the February term, 1844, of the Chancery Court at Dresden, by McCambell, Chancellor. He dismissed the bill—complainant appealed.

*Fitzgerald and Burrow*, for complainant.

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*Pavatt*, for defendant.

TURLEY, J. delivered the opinion of the court.

The bill charges, that defendant, Barfield, purchased of complainant a negro, and gave in part payment a note on Hamilton & Caldwell; that by the terms of the contract, defendant was to be absolutely responsible for the payment of the note, in case of the failure of the drawers to pay it; and that they had so failed, and were insolvent; but that the defendant taking advantage of the inability of the complainant to read or write, endorsed the note without recourse upon him, either in law or equity; and prays for a decree for the amount against him.

The answer of the defendant expressly denies the allegation, that he was to be responsible for the note by the terms of the contract; and alledges that he refused to buy the negro upon such terms, and that the complainant took the note upon the credit of the drawers, and without recourse upon him.

The allegations of the bill are proved by one witness, who can neither read nor write, but his testimony is not supported by any corroborating circumstances. The Chancellor dismissed the bill, and we think correctly. It is a well settled principle of Chancery practice, that the matter of the bill cannot be decreed against the answer upon the unsupported testimony of one witness.

This is the only question in this case, and the decree of the Chancellor will, therefore be affirmed.

**SAUNDERS vs. FULLER.**

1. The hearsay testimony of the living members of a family, and the hearsay of its deceased members, as to who were their ancestors, and as to the periods of their deaths, are entitled to more weight than the hearsay of persons unconnected with the family.
2. On a motion for a new trial the affidavits of jurors will not be received for the purpose of showing that the jury misunderstood the charge of the court.

*McLanahan and Scurlock*, for plaintiffs.

*Gibbs and Bullock*, for defendant.

TURLEY, J. delivered the opinion of the court.

This is an action of ejectment, which was tried before the Honorable John Read, Judge of the 10th Judicial Circuit, at the December term, 1843, of the Circuit Court of Madison county, and a verdict and judgment rendered for the defendant.

Upon the trial it appeared, that the tract of land in dispute had been granted by the State of Tennessee to the heirs of one Henry H. Story, a soldier of the revolution, who has been long dead, but at what exact period he died is not fixed by the proof: he died without issue, leaving brothers and sisters, whose rights as heirs depend upon the date of his death; if previous to 1784, his eldest brother was his heir; if after that period, and before 1796, all his brothers jointly, and if after 1796; his brothers and sisters jointly. The proof upon this point is conflicting. Sarah Saunders, the wife of Richard Saunders, the lessor of the plaintiff, is proven to have been the daughter of William Story, one of the brothers of Henry H. Story, and one of his heirs at law, provided he died after 1784, if before, not. Daniel Fuller, the defendant, is proven to have married the daughter of one Edward Story, who claimed to be the son of one James Story, the eldest brother of said Henry H. Story. Whether Henry H. Story had a brother James is doubtful, the testimony upon the point being conflicting, several aged witnesses deposing, that they were well acquainted with the Story family, and never knew or heard of James Story, a brother of Henry H., but knew of three brothers, John, George and William; while on the other hand, several witnesses, among whom, one

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a sister of Henry H. Story, and family connexions of Edward Story, prove that Henry H. Story had a brother James; that he was the eldest brother, and that Edward Story was his son.

Now, if Henry H. Story died after 1784, then Sarah Saunders, the lessor, is clearly one of his heirs at law, and entitled as such to her share of the premises in dispute, unless barred by the operation of the statute of limitations, which is insisted upon, but need not at present be examined into by this court: if he died previous to 1796, leaving a brother James as contended, then Sarah Saunders is not one of the heirs at law of Henry H. Story, and her lessee has no title whatever to the premises in dispute, and as such can maintain no action against the defendant, whether he be in the possession as husband of one of the heirs of James Story or not.

These different questions were submitted to the jury under the charge of the court, and found against the plaintiff, upon which he moved for a new trial, and based his motion upon the grounds of a misdirection by the Judge, and misapprehensions by the jury.

Upon the points in controversy, the court said to the jury: "That they were to weigh the whole of the evidence, and render their verdict according to the conclusions to which their minds might arrive from the testimony taken collectively: that in weighing the evidence they should endeavor to reconcile it, so as to make it all consistent; but if, they could not reasonably reconcile it, they should give credit to the testimony, which they should be of the opinion, most merited it, they being the judges; that the rule, permitting hearsay evidence to establish pedigree, had been adopted from necessity; that of this kind of testimony, the law regarded that of living witnesses, members of the family entitled to the highest credit, and next to that, the testimony of deceased members of the family."

There is no error in this charge: it expounds the law correctly. The testimony of living members of a family, and the hearsay of its deceased members, as to who were their ancestors, and the periods of their death, are entitled to more weight than that of persons unconnected with the family, strangers to its blood, and, therefore, having no feeling nor interest in keep-

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ing accurate information upon the subject. The court does not say that such proof is entitled to more weight than the positive information of other witnesses, who speak from their own personal knowledge and observation; to have said so, would have been erroneous, but the instruction is expressly confined by the court, to hearsay testimony, which he informs the jury is received in cases of pedigree from necessity.

There being no misdirection, and the testimony being sufficient to maintain the verdict, we will not enquire whether there be any thing in the allegation that the jury misunderstood the charge and were misled thereby.

Three of the jurors swear, that the principal question, and the one which decided the case, was as to the time when Henry H. Story died, and that they would not have found that he died before 1784, but for the fact, that the court charged, that the testimony of members of the family was entitled to more weight as to births, marriages and deaths, than that of persons not members of the family.

Now, we have seen that the court charged no such thing, except as to cases where such proof rested on reputation or hearsay. We have had occasion repeatedly to say, that affidavits of jurors for the purpose of setting aside a verdict must be received with great caution, and that we will not carry the matter further than it has been already. We have said that they shall not be received to show, that the jury refused to obey the charge of the court; and we now say, that they shall not be received for the purpose of showing that the charge was misunderstood. But few verdicts would stand if this were the test. It is sufficient if the charge be correct: if the verdict from misapprehension be found either against the law of the case, or the weight of testimony, the evil can be easily remedied by a new trial without affidavit; and if it be against neither the one or the other, there is no remedy required, and no necessity for investigating the secret operations of the minds of the jurors, in arriving at the verdict.

There was no error in refusing a new trial, and we, therefore, affirm the judgment of the Circuit Court.



**HARRIS vs. MEMPHIS BANK.**

Whenever a party has a fixed residence and place of business known to the holder of a note at the time of receiving it, a change of domicile as a matter of fact is not to be presumed; and if the holder acts upon said knowledge, on giving notice to the endorser he will not be chargeable with negligence, unless he did, or from circumstances shown, ought to have known of such change of domicile.

Assumpsit, by the F. & M. Bank in the Circuit Court of Tipton, against Harris, as endorser. Plea, non-assumpsit, and issue. It was tried at the June term, 1840, and verdict and judgment given for the defendant, from which the Bank appealed. This judgment was reversed and the cause remanded. See 2 Humphreys, p. 311. -

It came on again for trial in the Circuit Court, at the October term, 1842, Read, Judge, presiding, and was submitted to a jury, and a verdict and judgment were rendered for the plaintiff, from which the defendant appealed in error.

*T. Craighead*, for the plaintiff in error.

*H. G. Smith*, for the Bank.

**REESE, J.** delivered the opinion of the court.

The action in this case is brought to subject the plaintiff in error as endorser of a note payable at the Memphis Bank, and of which that bank at the time of its maturity was the holder. The note was made in the month of June, and made payable in October afterwards. At the time the note was made endorsed and became the property of the bank, and for a long time before, the plaintiff in error had a fixed residence in Randolph as a merchant. About a month after the making of the note, he left Randolph for the town of Columbia, Middle Tennessee, and returned to Randolph to reside about November or December afterwards. There is some contrariety of testimony in the record, as to whether Harris, at the time he left Randolph, proposed to change his domicile from that place to Columbia. He did in fact settle in Columbia.

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When the note fell due in October, the protest and notice of non-payment were forwarded by mail to Randolph. The notary enquired of the cashier of the bank, as to the residence of Harris, and was informed that he resided in Randolph. The cashier so believed, for Harris had done considerable business with the bank before that time, and all the notices had been sent to Randolph. It was not shown that the board of directors in fact knew of the change of domicil. Randolph is fifty miles from Memphis, and there is considerable commercial and other intercommunications between the two places. When a party at and before the time of making a note, has a fixed residence and place of business, known to the holder, and which continues at the time the holder became possessed of the note, and the party afterwards, and before the maturity of the note, changes his domicil, but the holder, at the time of maturity, is in point of fact ignorant of such change, and sends the notice to the place of such former residence, the notice will be sufficient, unless proximity of place, frequency of intercommunication, or circumstances of notoriety attending or following the change of domicil, and of such a character as to amount to evidence that the holder did know of such change, or if ignorant, that he was ignorant because he omitted the care and attention which belongs to ordinary diligence. This is upon the principle, that where a party has a fixed residence and place of business known to the holder at the time of his receiving the note, a change of domicil as a matter of fact is not to be presumed; and if the holder acts upon such knowledge, he will not be chargeable with negligence, unless he did know, or from circumstances shown ought to have known of such change of domicil.

We understand, from the charge of the Circuit Court, as set forth in the record, that it was the purpose of the honorable Judge to state the law as we have above stated it. The charge has undergone in the argument of counsel some criticism for its supposed obscurity, and in other respects. But the meaning of what the court did charge, we regard as consistent with our view of the law: and what the court was asked to charge, but

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refused to charge, we think was properly refused. There is nothing in the record to show that a charge more precise, or

NOTE.—*Farmers' & Merchants' Bank vs. Eddings*.—This case, though it turns on the weight of evidence as to a question of fact, yet as it illustrates the principles of commercial law in reference to notice, it perhaps is worthy of insertion.

GREEN, J. This is a suit against the endorser of a promissory note. Notice to the defendant was not sent to the post-office nearest his residence or at which he usually did business. The principal question contested before the jury, was, whether the holder or their agent had used due diligence in endeavoring to ascertain the place to which the notice should have been sent. The charge of the court was not excepted to, and the jury found for the defendant. The plaintiff appealed to this court, and insists that the evidence of diligence is full and ample, and that the verdict of the jury is wholly unsupported; and therefore *this* court, upon the principles that govern *its* action in such cases, should award a new trial.

The plaintiff proved by Mr. Rose, the notary public who protested the note, that it was his usual custom to make enquiry of persons he supposed ought to know the residence of parties, and then act upon such information. He was led from information thus obtained to send notice of the protest to the defendant at Birch Pond, being satisfied that was his post-office from such information. He thinks he obtained his information from Mr. Lofland, cashier of the Farmers' and Merchants' Bank at Memphis. The witness does not certainly recollect that he made enquiry of any one: his *belief* in this case is founded on his usual course of proceedings in similar cases, and not from any certain recollection. Mr. Lofland usually gave him information as to the residence of endorsers; and when he could not give it, the witness then obtained the best information he could get from others. He is certain he obtained his information in this case from Mr. Lofland, or some other person who he supposed knew the post-office of the defendant.

The plaintiff proved by Charles Lofland, cashier of the Bank, that he gave instructions to Mr. Rose, the notary, in what manner to notify the endorsers of this note, and the witness supposes the notary mailed notices according to the information thus given, unless he obtained more satisfactory information from others. He recollects hearing at the board, something about the residence of the defendant, and afterwards of enquiring about the proper post-office to address him; and upon the information obtained, gave directions to Mr. Rose. The witness cannot say certainly of whom he made enquiry, but is in the habit of making enquiry of merchants and business men, who are most likely to know.

The defendant proved by several witnesses—publishers of newspapers and others—that they could have given correct information as to his residence, had enquiry been made of them.

Upon this evidence, we are called upon to say that the jury were guilty of *rashness* in finding a verdict for the defendant,—that the evidence *greatly preponderates* against the verdict, and that is wholly unsupported by proof.

We have had occasion at the present term, in the case of *Harris against the Farmers' and Merchants' Bank of Memphis*, to decide, that a notary public, as the agent of a bank, has used due diligence if he has made enquiry of the cashier of the bank from whom he has received direct and positive information of the place of residence of a party and has sent notices according to that information, although it turns out that the notice was sent to the wrong post-office.

The cashier of a bank is usually as well informed as to the residence of parties to paper negotiated at the bank, as any other person is likely to be, and he is generally a man of character and intelligence. If he assumes to know a party's residence, and gives to the notary direct information on the subject, it is unreasonable to require that

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more amplified, would have been or ought to have been followed by a different verdict.

Let the judgment be affirmed.

he should continue his enquiries after he has received information with which he has a right to be satisfied. The cashier of the bank has no interest in the paper; and the objection, that information from the holder of the paper only, is not sufficient, does not apply to him.

The question, then, for the jury, in this case, was, whether enquiry was made by the notary, of the cashier, who assumed to know the residence of the defendant, and give direct information, upon which the notary acted.

The jury have found that these facts were not sufficiently established; and we cannot say, from the proof, that they were clearly wrong.

The evidence conduces to prove these essential facts; and had the jury found for the plaintiff, we would not have disturbed the verdict. On the contrary, neither the notary public nor the cashier of the bank speak of the transaction with any certainty of recollection as to what occurred in this particular case. The notary expressly says, he has no distinct recollection that he enquired of any one; but he expresses a strong belief that he did so, because it was his usual custom in such cases. Now, the usual custom of a notary is not sufficient evidence of his diligence, in a case where he has no recollection of the facts. The strength of the witness's belief, that he made due enquiry and acted upon it, does not give any weight to his evidence; for that belief is referable solely to his confidence resulting from his knowledge of his usual habits of diligence in such cases.

The testimony was entitled to be weighed and considered by the jury, as constituting a circumstance tending to prove the fact of diligence, but of itself was not sufficient proof. This evidence is somewhat strengthened by Mr. Lofland's testimony; who states, that he gave the notary instructions where to send notices in this case. But his own knowledge as to the defendant's residence seems to have been vague and uncertain. He had heard something said about it at the board, and he made enquiries afterwards about the proper post-office to address him.

This evidence leaves the matter still in some uncertainty. Mr. Rose does not recollect the information given him by Mr. Lofland, so as to be able to state *from memory*, that he sent the notice to the post-office indicated by Lofland; nor does Lofland *remember* to what place he gave directions to send it, so as to identify his instructions with the fact, as it now appears in proof.

Upon the whole, the proof left the questions upon which the defendant's liability depends, in doubt and uncertainty; so that we should be overturning our long established and uniform rule upon the subject, were we to grant a new trial.

Affirm the judgment.

## APPENDIX.

JACKSON: APRIL TERM, 1843.

### THE STATE *on the Relation of* PAINE *vs.* PAINE.

1. The father, upon the principles of common law, is entitled to the exclusive custody of his children; and if he have the custody of them, a court of common law will not deprive him of it, except for an abuse of trust, either by improper violence or improper restraint, and such as would justify the issuance of a writ of *habeas corpus* for their protection.
2. A court of common law is not bound in a proceeding by *habeas corpus* to deliver the child to the father, where he has not the possession of it, but may act upon its discretion, according to the circumstances of the case. In all such cases, the great leading object should be, the interest and welfare of the child; and therefore, where the child is of sufficient age to judge for itself, the court should leave it to go where it pleases.
3. The wife has no right by common law to the custody of the children as against the husband, and she cannot be looked to by the court, except so far as she may be considered in reference to the tender age of the children and other considerations, as the most suitable person to have control of them for their benefit.

On the 1st day of March, 1841, William L. Paine presented a petition to William C. Dunlap, one of the Judges of the Circuit Courts of the State of Tennessee, in which he stated that his wife, Eliza Paine, had abandoned him and taken with her his three children, Henry, Sarah, and John, minors, and that she detained them from the custody and possession of the petitioner, and praying the issuance of the State's writ of *habeas corpus*, commanding the said Eliza to bring the said children before him at a day and place to be specified, and show cause, if any she had, why the said children should not be restored to his possession.

This writ was issued, and served on the said Eliza, commanding her to appear before the Judge of the Circuit Court, to be held at Sommersville, Fayette county, on the 3d Monday in May, 1841, and have with her the said three children, Henry, Sarah, and John.

She filed an answer, in which she stated, that "a long and continued series of acts manifesting an indifference, coldness

[The State on the relation of Paine vs. Paine.]

and neglect on the part of her said husband, to which was added violent and abusive language, without provocation, and finally inhuman treatment left her no alternative but to drag out a wretched and miserable existence, or abandon a home where she believed it would be neither safe or prudent to remain." She admitted that she took with her the three children; Sarah, five years of age; Henry, aged about seven, and John, about three years. She insisted, that the tender years of said children required the constant care of a mother; and denies that she had exercised any illegal or unwarrantable constraint over either of them, but had exercised only such control as a parent, anxious to promote the morals of the children, should exercise. She stated, that he was incompetent to have the control and possession of the children, and that she was unwilling that he should have it, for the reason that he was a miserable hypochondriac, petulant, capricious, and violent in his temper, and that, in the event that he should have the possession of them, they would be thrown chiefly in the keeping of negro slaves, and their mental and moral culture neglected by reason of his absence from home, &c. &c.

The relator replied. He denied that he had treated her with neglect or insult, or inhumanly, or that he had ever treated her with violence, except on one occasion, when, many years before, he slapped her on the face slightly, in a moment of irritation, caused by her charging him with falsehood. He alleged that he had been unhappy, but that it was in consequence of the bad temper and improper treatment of respondent. He denied that he was from home more than usual, and then only in the ordinary pursuits of business, &c. &c. and vindicated his right to his children, and his fitness for the task of training and educating them. He stated that he was not desirous of taking the children entirely away from their mother, but was willing that she should have free, regular and unembarrassed intercourse with them, provided they should be in his control and where he could enjoy their company at pleasure.

There was proof taken, by which it appeared that W. L. Paine, the relator, a widower, having a competent estate, consisting of real and personal property, and having three children

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by a deceased wife, intermarried with Eliza Paine. She had some property. They had three children, and were both members of the Methodist church at the time she abandoned him. Some witnesses proved him to be a man of good moral character in his public deportment. The preponderance of the testimony is, that he was hypochondriacal, peevish and capricious, and instances of coldness and neglect towards his wife were proved. Conjugal infidelity, on either side, was not charged or proved, and proof was not wanting to show that both were competent and fit to have the custody and control of the children in most respects.

The case was tried at the January term, 1842, by Judge Dunlap; and he being of the opinion that the children Henry, Sarah and John were not "unlawfully restrained" by said Eliza Paine, directed that they "be restored to their mother, the said Eliza;" that "the petition of said relator be dismissed, and that he pay the costs." From this judgment he prayed and obtained an appeal.

*H. G. Smith*, for the relator. The object and effect of this writ of *habeas corpus* are to discharge persons from unlawful imprisonment. Every restraint upon liberty is, in the eye of the law, imprisonment, wherever may be the place or in whatever manner in which the restraint is effected. 2 Kent's Com. 26.

When the writ is directed to private persons to bring up infants, the court is bound *ex debito justitiæ* to set the infant free from improper restraint. *Rex vs. Delaval*, 2 Bur. 1431.

Detention of the infants by a person against the will of the party entitled to the custody of them, is an unlawful and therefore an improper restraint. Detention by one against the will of the other, of two or more persons having an equal and joint right of custody, as where there are two or more testamentary or other guardians of the person, is not an illegal restraint which would be removed by the writ of *habeas corpus*. But this applies where there is a joint and equal right of custody—not where the custody is claimed by equal, distinct and opposite rights. There cannot be equal, separate and adverse rights.

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The father and mother, living separate, have not a joint and equal right to the custody of the children of the marriage. One or the other has the better and exclusive right, and this is the father.

The father has the natural and legal right to the custody of his children—even against the mother. Shelford on Marriage and Divorce, 677, 679; 18 Wend. 642; 19 id. 16; 16 Pick. 205; 1 Bl. Com. 452; 5 East, 221; 31 Common Law Reports, 154. This is a universal principle in civilized nations. It is the natural law—the Christian law. It is founded in the physical, moral and intellectual superiority of the male sex. It results from the duty devolved by law on the father, to maintain, educate and protect his children. To discharge the duty, requires the power and involves the right. The right is a legal right, and it is coupled with an interest and will be enforced at law.

The mother, as such, has no authority over her children. Reeves's Dom. Rel. 295; 1 Bl. Com. 453; 2 Fon. Eq. 512, n. h; 18 Wend. 642.

The right of the father being exclusive and legal, the courts will enforce it by the writ of *habeas corpus*. The language of the cases is, that the court is bound to do so. Shelford on Mar. and Div. 678; 16 Pick. 205; 31 Com. Law Rep. 159; 19 Wend. 16; *Murray's* case cited, 5 East, 223; Jacobs, 251, (cited Shelf. 680, n.) 31 Com. Law Rep. 376; 2 Sevy & Rawle, 174; *Alston vs. Foster*, before Chan. Buckner of Miss. in 1841; 19 Wend. 16; 18 Wend. 637.

The right will be enforced in favor of the father, against the mother, notwithstanding provisions contained in deeds of separation for their residing with the mother. Shelf. 680; Jacobs, 251; 11 Ves. 531; *Lytton's* case cited, 5 East, 222, (Shelf. 680.)

In no case will the court, on *habeas corpus*, take the children from the father. 9 I. B. Moore, 278, (17 Eng. Com. Law Rep. 159.)

The husband is entitled to the custody of the person of his wife. Reeves's Dom. Rel. 66; 2 Kent's Com. 181; 4 Petersd. Ab. 21; Shelf. 667; 16 Pick. 206.

It being thus clear, that the father has the legal and exclusive right to the custody of his children against all persons, even the



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mother, detaining them contrary to his will; that the writ of *habeas corpus* is the proper writ to enforce this right, it remains to notice on what principles the courts act in executing or withholding their powers at the instance of the father.

When the children are of years of discretion, the court invariably places them at entire liberty, and suffers them to go where they please. Such were the cases, *Delaval's*, 3 Bur. 1431; *Smith's*, 2 Strange, 982; *McDowle's* case, 8 J. R. 328.

When the infants are not of years of discretion, the court delivers them to the father or not, according to circumstances, regarding mainly the interest of the child. See cases *passim*. See all the cases cited.

The presumptions are all in favor of the father. The entire burden of proof lies on the party denying the father's claim.

It must be a clear and strong case of unfitness on his part, as being a vagabond, &c. that will be cause for withholding the children. *Bugg's* case, 16 Pick. 205.

Open and notorious cohabitation with another woman than his wife, no cause. *Greenhill's* case, 31 Com. Law Rep. 154.

No cause, though the child was not the offspring of the apparent father. *Murray's* case, cited 5 East, 223.

No cause, that father has no place of residence of his own. *Westmeath's* case, Jacobs, 251, (Shelf. 680, n.)

Ill usage of wife, compelling her to withdraw from him, no cause. 19 Wend. 16, and other cases.

No cause, the infancy of the children. 19 Wend. 16—infant 5½, 4½ and 2½ years; 31 Com. Law Rep. 153; 16 Pick. 205, 3 or 4 years; Jacobs, 251, 5 years 7 months; 2 Serg. & Rawle, 174, 10 and 7 years; 31 Com. Law, 9 and 6 years; *Murray's* case, 5 East, 222 cited, 5 years.

Nor is the sex of infants cause. *Greenhill's* case, females 5½ to 2½ years; *Westmeath's*, female 5 years; *Addicks's*, females 10 and 7 years; *Isley's*, female 9 years.

Nor is the mother's fitness. Shelf. 679; Jacobs, 251; 31 C. L. Rep. 154; 16 Pick. 205; 2 Serg. & Rawle, 174; *Alston's* case before Ch. Buckner.

Nor is the poverty or humble station of the father.

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Nor divorce or cause of divorce. *Murray's* case cited, 5 East, 222; *Greenhill's* case, 31 C. L. R.; *Addicks's* case, 3 S. & R.

The mother's good character is no cause for denying the custody to the father. In no case is such principle alluded to.

The facts of this case do not make out such a case against the father as by the authorities will authorize and justify the court in refusing to restore the children to him. 31 C. & R. 161; 2 Strange, 982; 8 J. R. 328; *Rex vs. Delaval*, 3 Burrow, 1421; 13 J. R; Shelford, 678; 19 Wend. 19; 16 Pick. 205.

*G. D. Searcy*, on the part of the defendant. We contend that the court, in this summary proceeding, cannot inquire into, nor try the right of guardianship. All that can be done, is to see that there is no illegal restraint; and if there is, to deliver the party from it. If the party illegally restrained be an infant of tender years, and incapable of making an election, the court will form an opinion for it: and in making the election, the court will not consider, nor adjudicate upon, the rights of the father or the mother, but will be governed exclusively by the *interest* of the infant.

These principles are well settled both in England and America, and it is believed no authority can be found to conflict with them.

In the case of *The King vs. Delaval*, 3 Burrow, 1436, which was an application on the part of a father to obtain possession of his daughter, who was restrained for the purpose of prostitution, Lord Mansfield delivering the opinion of the court, says: "In cases of writs of *habeas corpus*, directed to private persons, to bring up infants, the court is bound *in debito justiciæ* to set the infant free from improper restraint; but they are not bound to deliver them over to any body. This must be left to their discretion, according to the circumstances that shall appear before them." In this case, the girl, being of sufficient age to judge for herself, was discharged from the illegal restraint, and left to go where she pleased. The cases of *Rex vs. Clackson*, 1 Strange, 444, and *Rex vs. Smith*, 2 Str. 712, are to the same point, and cited by the court. The case of *Rex vs. Hopkins*, 3 P. W. 151, recognizes the same doctrine.

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In Bacon, title *Habeas Corpus*, b. 13, it is expressly stated, that on writs of *habeas corpus* to bring up infants, the court will not enquire into nor try the right of guardianship. The American cases which recognize the principles above stated, are numerous. The case of *Wollstoncraft*, 4 J. C. R. 80, was an application by the testamentary guardian to obtain the possession of his ward in the custody of her mother. The application was refused. The court say, "The course and practice of the court in these cases was *only to deliver* from illegal restraint, and not to try the right of guardianship or deliver the infant over to the custody of another."

The case of *Waldon*, 13 Johnson R. 417, was an application by a father to obtain possession of his infant child in the custody of its grandfather. The application was refused. The court say, "that the child cannot be considered under any illegal restraint;" that the possession of the child "is not a matter of right which the father can claim at the hands of the court. The attention of the court will be directed to the benefit and welfare of the infant."

The case of *McDowle*, 8 J. R. 328, was an application by the father to obtain possession of his two sons in the custody of the society of Shakers. The court recognize and act upon the principle, that all they can do, is to deliver from illegal restraint. The case of *The Commonwealth vs. Addicks and wife*, 5 Bin. 520, was an application by a father to obtain possession of two infant daughters in the custody of their mother, an adulteress, who was then living with her paramour. The application was refused, upon the ground that the court could not try the right of guardianship: they could only deliver from illegal restraint: that their anxiety would be directed to the children; and they, on account of their tender years, stand in need of the assistance and care of their mother. In the case of *The State vs. Smith*, 6 Green, 463, the same principles are recognized and acted upon.

In the case of *The United States vs. Green*, 3 Mason R. 482, Judge Story, in delivering the opinion of the court, said: "It is an entire mistake, to suppose the court is at all events bound to deliver over the infant to its father, or that the latter has an absolute vested right in the custody.

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The case of *D'Hauteville*, lately decided in Pennsylvania, was also an application on the part of the father to obtain the custody of his infant child in the possession of the mother. In this case the court go fully into an examination of all the cases on the subject, and recognize and act upon the principles on which we rely. The application was refused. The possession of the mother was not considered as illegal, and the court, in the exercise of their discretion, considered the interest of the infant. This case, together with that of *Addicks* and several others, settles the principle, that in judging of the *interest* of the child, pecuniary considerations alone are not to be the governing principle: the health, the morals, and the comfort of the child, are to have great weight.

The case in 5 East, 221; in 9 J. B. Moore, 298; E. C. L. R. and the case of *Greenhill*, 31 E. C. L. R.) all of which are confidently relied upon by the other side,) are not in point. There is no principle admitted or settled in either of the above cases in conflict with the principles for which we contend. And so far as these cases can be considered as authority in the case, they go to support the positions assumed by us.

The cases of *De Manneville* and *Skinner* were applications on the part of the mother to obtain the custody of children in the possession of the father. The applications were refused, for reasons which we will state presently.

The case of *Greenhill*, though in fact an application by the father, was placed upon the same ground and brought within the same rule which governs when the possession is with the father, and the mother seeks to deprive him of it. The facts of the case are: "That the father had rented lodgings for his wife and children, and during his temporary absence the wife abandoned the house, leaving the children in it. Her brother afterwards abducted the children and placed them in the custody of the wife."

Denman, J. in delivering his opinion, says: "There is no doubt, when the father has the custody of his children, he is not to be deprived of it, except under peculiar circumstances, and these do not appear in this case; for, although misconduct is imputed to Mr. Greenhill, there is nothing proved against him,

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which has ever been held sufficient ground for removing children from their father. And if *we look strictly at the evidence, this will be found a case falling within the general rule just stated; for when the children were in the house rented by the father, and in the charge of those whom he had appointed they should be, the mother's conduct in causing them to be removed, was equivalent to taking them out of his custody; and if so, ex concessis he has a right to claim that they be restored.*" Littledale, Judge, in giving his opinion, says: "The children were *in effect* in the custody of the father, in a place selected by him, and have been removed, and he only *seeks to bring them back.*" It is manifest, that this case was put in the same class, and decided upon the same principles which governed in the case of *De Manneville*, and the case of *Skinner*, where the possession was with the father, and the mother or some other person seeks by *habeas corpus* to deprive her of it. These cases rest upon the ground, that unless there is illegal restraint, there can be no action of the court: and so far they are authorities for us. The principles determined in these cases are, that the father is the natural guardian of his child. His custody, therefore, is the legal custody, and the legal custody is *by presumption* of law the free custody. Now, the custody being by presumption of law the free custody, there is nothing upon which the writ can operate. The court cannot act, because there is no *illegal restraint*. Remove this presumption of "*free custody*," (which may be done by proof of corruption, depravity, inability to take care of the child, or just ground to apprehend cruelty on the part of the father,) and the court will then act, and in the exercise of their discretion may deprive the father of the custody. The distinction is here, that where the father has the possession, the power of the court is limited; and in the language of Judge Denman, "he cannot be deprived of it, unless under peculiar circumstances," viz. inability to take care of the child, depravity, disqualifying him from properly educating the child, or a just ground to apprehend cruelty on his part. When these facts are made to appear, the *presumption* that his custody is the free custody is *rebutted*, or rather a counter presumption is raised of illegal restraint, and the court will then proceed to act on the writ, and deliver from that restraint;

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and if the child be incapable of forming a judgment, the court will, in the exercise of their discretion, make an election for it. In the case of *Skinner*, the court expressly say that they have no power to act. Why had they no such power? The answer is plain. There was no illegal restraint; there was no proof of depravity or unfitness on the part of the father, rebutting the presumption of law, that his custody was the free custody.

The case of *Nickerson*, 19 Wen. R. 16, and the case of *Biggs*, 16 Pick. R. 203, are placed precisely upon the same ground of the case of *Skinner*, *De Manneville* and *Greenhill*, and belong to that class of cases. It is true, that in these cases the distinction is not so clearly stated: yet both of these cases went off exclusively on the ground, that the wife abandoned the husband without any cause whatever—as in the case of *Greenhill*. In the case of *Nickerson*, the court use this language: “Unless the case can be materially varied, Mrs. Nickerson has greatly mistaken the duties and obligations which devolve upon her by the marriage vow, and she is now living in a state unauthorized by law.”

In the case of *Biggs*, the court say, “that unless there is some justifiable cause of separation, the court ought not to sanction the unauthorized separation of husband and wife, by *ordering the child into the custody of the mother*, thus separate and out of the custody of the father.” What does the court mean, by “ordering the child into the custody of the mother?” The child was already in the mother’s custody. Is it not manifest, that, like the case of *Greenhill*, the court considered the unauthorized abandonment of the husband by the wife, and the taking of the child, as equivalent to depriving her of the possession, and bringing the case within the rule stated by Judge Denman, in the *Greenhill* case.

In the case of *Nickerson*, the court cite and rely upon the case of *De Manneville* and the case of *Skinner*, and the observation of Lord Eldon, in the case of the *Duke of Bedford*, (in which he states that the father is the natural guardian, and places the right of the court to interfere upon the breach of that trust,) as authority.

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*W. T. Brown*, on the same side.

TURLEY, J. delivered the opinion of the court.

Among the multiplied duties of a court, there are none the discharge of which is attended with more pain and regret than those which interfere with the domestic relations of husband and wife, parent and child. These relations are of so sacred a character, and involve to so great an extent the peace and happiness of mankind in general, that it cannot be otherwise than a source of deep mortification to a well-regulated and humane mind to be compelled publicly to investigate and determine conflicting rights arising out of feuds existing between them.

This difficulty is not lessened, but increased, by the difference of the sources from whence our law is derived; on the one hand, the common law, with its stern and iron-bound principles based upon the manners, customs and thoughts of our ancestors a rude and undigested people of rough energy and indomitable pride, addicted to arms and considering battle and conquest as the only great and glorious duties of life, making all their institutions civil and domestic subservient to these ends, giving a paramount right to the superior over the services, liberty and even life of the inferior, embracing in this view the relations of landlord and tenant, husband and wife, parent and child, guardian and ward; and fixing their duties and rights, without regard to justice or humanity, upon the principles of *concentrated power* upon which the feudal system rested; on the other hand, the jurisprudence of a refined race, one that had emerged from its barbarism, and after having subdued the world, had been for centuries polished by philosophy, poetry, eloquence and art, even to enervation.

By the one, women, and children of immature years, held as they always have been by uncivilized people as the property of the husband and father, having no will of their own, no rights in contradiction to his power and authority, and only considered *through him* as a portion of the community in which they lived. By the other, with more regard to the harmony of nature, looked upon as beings created not only by the same

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power, but, with exceptions resulting from the subordinate position in which the laws of nature place them, as having equal rights to all the enjoyments of life, and as safe and adequate protection for them, as the husband and father.

These variant principles have for a length of time been antagonist to each other in England, and to a great extent in this country—the common law courts giving protection to the one, and the courts of chancery to the other. It would be desirable to have these relations placed upon a wise and humane basis by positive enactment, and not leave them as they are at present to a considerable extent, *in nubibus*.

In the case before the court, we are only called upon to expound what is the common law relation between the father, the wife and the child, and to enforce the rights as thus recognized. Unfortunately for all the parties to this controversy, the husband and wife have not found it to their happiness to comply with their mutual promise so solemnly made to each other, to live together until God should part them. There seems to be no want of integrity on the part of either—he is proved to be peevish and fretful, and she is no doubt high-spirited and respectful. But we will not undertake to determine upon whom the greater blame rests. Be this as it may, the wife has left the husband and taken his children with her, and he is now asking the aid of this court to restore them to his possession. And the only question for us to determine, is whether the relief thus sought can be given.

That the father is entitled upon the principles of the common law to the exclusive custody of his children is not and cannot be controverted; and that if he have it, a court of common law will not deprive him of it but for an abuse of his trust affecting their persons either by improper violence, or improper restraint, and which would justify the issuance of a writ of *habeas corpus* for their protection. Shelford in Marriage and Divorce, 409, 410, and the authorities there cited. But in this case he has lost their possession, and the question as here presented is under a different phasis. The probability is, that the rigid principles of the common law would have restored the possession of a minor child to the father under all the circumstances; for,



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as has been observed, this would have been in conformity with the social principle. But if it ever were so, it is so no longer, and perhaps the mitigation so far as it has extended is adopted from the civilians. The mitigation of the principle is, "that the court is not bound in a proceeding upon *habeas corpus*, to deliver the child to the father, but may act upon its discretion according to the circumstances of the particular case." The first, and so far as we at present know, the earliest case referred to in support of this position, is the case of *The King vs. Delaval and others*, decided by Lord Mansfield, in 3 Burrow, 1434. The predilections of that jurist for the civil code and his strong disposition to engraft its principles upon the rude stem of the common law, are well known. However, the principle thus laid down has been so repeatedly recognized both in England and the United States, that it is now at all events a part of the common law. Shelford on Marriage and Divorce, 410; 8 Johns. Rep. 328; 13 do. 418; 5 Binney, 520; R. M. Charlton's Rep. 489; 6 Greenleaf, 463; 3 Mason, 382; and the celebrated case of *D'Hauteville*, where all the authorities are well examined. The principle being thus established, that the court is not bound by a fixed principle of right to restore a child to its father, but may at its discretion withhold it, the question occurs, Under what circumstances may that discretion be exercised? This must of necessity in many instances be a thing difficult for judicial determination, as no fixed and determinate principles can be established upon the subject—every case resting upon its own peculiar circumstances. It is to be observed, that in all cases the interest and welfare of the child is the great leading object to be attained, and therefore if it be of an age sufficiently matured to judge for itself, the court will free itself from the responsibility of determining the controversy, by leaving it at liberty to go where it pleases. *Rex vs. Smith*, 2 Strange, 982; 8 John. 328. But if it be not of such an age, the court will judge for it. There are certain principles upon the subject recognized by all the authorities, and controverted by none; such as, if the father be unworthy, or incapable morally or physically, to take care of the child, if there be apprehensions of improper restraint, the court will not restore the possession to him.

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In the case of *D'Hauteville* it was held, that if the health and age of the child were such as to make the vigilance and attention of the mother necessary for its care, it would not be taken from her and given to the father. In the case of *The Commonwealth vs. Addicks and wife*, 5 Binney, 520, Chief Justice Tilghman says, it is the interest of the children to which the anxiety of the court is directed, and he refused in that case to take them from the mother, on the ground of their tender age, one of the children being ten, and the other seven years of age. They were both daughters.

We deem it useless to enter into an investigation of the particular circumstances upon which the different cases rest, with a view to reconcile them. They completely establish the principle, that the court has a discretion upon the subject, and a conflict of judgment is under such circumstances to be expected. But the principle, that it is the interest of the child which is to be looked to, without regard to the right of others, being established, relieves us to a great extent from the difficulty resulting from a want of certainty in the exercise of the right of discretion. We will not, as we ought not, attempt to establish any general rule upon the subject, but confine ourselves to the inquiry as to the rights of those interested in the case under consideration. The wife, by the common law, has no right to the children against the husband. Therefore she cannot be looked to in this case except so far as she may be considered by the court the most suitable person under the circumstances to have their control, for their benefit. The father is not shown to be disqualified either morally or physically for their care and culture; and the only question left for consideration is, in whose possession will the interest of the children be best provided for,—the father's or the mother's. There are three, the oldest a boy aged near eight years, the second a girl aged near six years, the third a boy aged near four years. We think, exercising our discretion from the best lights that our knowledge of society gives us, that the oldest boy can be better raised by the father than the mother under the existing circumstances, but that the other two are of too tender an age to be removed at present from the fostering care of the mother, who is proved

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to be worthy and well qualified for their protection. We therefore direct, that the eldest son be restored to the father, and that the daughter and youngest son remain with the mother until upon a change of circumstances it may be otherwise directed. We do this the more readily because the subject is now before the Chancellor, who has more power over it than we have by this proceeding.



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### ACCESSORY.

1. An accessory cannot be tried without his consent before the conviction of the principal, unless they are tried together. *Whitehead vs. The State*, 278.
2. An accessory cannot be put on his trial before the conviction of the principal, unless he consent thereto, or be put on his trial with the principal. This principle of the common law applies to the offence created in the 12th section of the act of 1829, ch. 21. *The State vs. Pybass*, 442.

### ACTION.

1. See EJECTMENT, DEBT, CASE, COVENANT, TROVER, ASSUMPSIT.
2. No action will lie to enforce a contract which is in violation of a statute, or of the common law, or which is immoral in its character, and contrary to public policy. *Hale vs. Henderson*, 199.

### ADMINISTRATOR AND EXECUTOR.

1. Harris, as administrator of McCollum, deceased, rented land to Caldwell: Caldwell took possession of the land by virtue of the contract, and enjoyed the benefit of it: Held, that in a suit by Harris, as administrator, against Caldwell, Caldwell had no right to dispute Harris's power to make the contract, but was bound to pay the sum agreed upon. *Caldwell vs. Harris*, 24.
2. The office of administrator is not filled till the bond be given. *Feltz vs. Clark*, 79.
3. And when the county court appointed Clark, who was the nominee of the nearest of kin, to be administrator of William and Priscilla Feltz, and Clark gave bond for the administration of Priscilla's estate only, but proceeded to settle the estates of each; and after the lapse of five years the nephew of the deceased his nearest of kin

ADMINISTRATOR AND EXECUTOR—*Continued.*

resident in the state, applied for letters. Held, that it was proper, upon bond being given by Clark according to law, to dismiss the petition of the applicant. *Ibid.*

4. Bryan gave Outlaw a bond to convey him six hundred and forty acres of land, section 15. They subsequently made a verbal agreement, that the bond should be discharged by conveyance of section No. 14, instead of 15, and Outlaw took possession of it. Isler, his son-in-law, his daughter, (she being the only heir,) and his widow, refused to convey either. Outlaw sued on the bond, and the defendant Isler, as administrator of Bryan, pleaded lunacy of obligor. Judgment was rendered, and thereupon the son-in-law, the daughter, and widow of the deceased, filed their bill to enjoin the judgment and compel Outlaw to accept in discharge thereof section 15. Held, that they were not entitled to the relief prayed for. *Isler vs. Outlaw*, 118.
5. Where an administrator cognizant of the facts failed to bring suit for the recovery of a slave, till the right was barred by the statute of limitations: held, that he was responsible for the value of the slave, with interest on such value, but not chargeable with compound interest. *Torbet's heirs vs. McReynolds*, 215.
6. The court may charge a trustee with compound interest, who has been guilty of fraud or such gross negligence as to amount to fraud, or where he has funds in his hands and profited by them, and failed to make a frank disclosure: but a mere failure to sue, does not make out a case which comes within the rule. *Ibid.*
7. McReynolds, Duncan and Blair were administrators of Torbet, deceased, and the co-administrator Blair having died, a bill was filed against McReynolds, Duncan, and the administrators of Blair. The bill was dismissed as to Blair's administrators, and the distributees recovered judgment against Duncan and McReynolds for all costs. Held, that Duncan and McReynolds were not liable for the costs of the co-administrator Blair. His administrators should recover no costs. *Ibid.*
8. The act of 1837, ch. 125, sec. 2, subjecting executors, administrators and guardians to indictment, in the event of a failure, upon notification, to settle their accounts once in each year, before the clerk of the county court, does not apply to cases where a final settlement has

ADMINISTRATOR AND EXECUTOR—*Continued.*

been made of all the estate in their hands. *The State vs. Parrish*, 285.

9. Where a father placed a son in possession of a tract of land, with the intention that he should have the use of it as a gift, such a state of circumstances excludes the idea of a contract for the payment of rent; yet where the father, under such a state of things, died intestate, the use and occupation of the land should be charged against the son in the distribution of the estate as an advancement. *Robinson vs. Robinson*, 392.

## ADVANCEMENT.

Where a father placed a son in possession of a tract of land, with the intention that he should have the use of it as a gift, such a state of circumstances excludes the idea of a contract for the payment of rent; yet where the father, under such a state of things, died intestate, the use and occupation of the land should be charged against the son in the distribution of the estate as an advancement. *Robinson vs. Robinson*, 392.

AFFRAY. See CRIMINAL LAW.

## AGENT.

An agent is competent to prove his own agency. 449.

## AMENDMENTS.

1. The question of the right of complainant to amend an attachment bond, cannot be made in the supreme court, unless a motion to amend was made in the chancery court. *Bank of Alabama vs. Fitzpatrick*, 311.
2. When the defendant applies to amend his pleadings, the amended plea must be offered: if it be not, it is in the discretion of the court to refuse the application.—*Rainey & Henderson vs. Sanders*, 447.
3. In an action for slander the defendant pleaded justification, and after the testimony was submitted to the jury the defendant moved the court to amend his plea of justification, so as to embrace any speaking of the words imputed before action brought. The defendant insisted that the amendment should be allowed only on condition of a mistrial and continuance. The court allowed the amendment without the condition: Held, that this was erroneous. The amendment should have been allowed, a mistrial entered, and the cause continued. *Fowles vs. Long*, 511.

**ANSWER.**

1. Where a fact is charged in the bill and denied in the answer, to authorize a decree for complainant there must be two witnesses, or one witness and corroborating circumstances, sustaining the allegations of the bill. But before this rule applies, there must be a positive and circumstantial denial of the facts alleged in the bill. *Raines vs. Jones*, 400.
2. Where the defendant admitted a tender, or conversations in regard thereto, in his answer, he could not, by a subsequent and amended answer, take back admissions. *Ibid*.

See GUARANTY.

**ASSUMPSIT.**

1. In actions of *indebitatus assumpsit* and debt upon executed contracts, the plaintiff may relinquish part of his claim, with a view to give a justice of the peace jurisdiction, and recover judgment for the balance. The judgment recovered is a bar to a suit for the part relinquished, if pleaded. *Curroway vs. Burton*, 108.
2. Where an action of assumpsit is brought upon an instrument which itself contains a promise or undertaking to pay, it is not necessary formally to set forth another promise resulting from the legal liability. *Woodson vs. Moody*, 303.
3. An action of assumpsit will lie on an assignment of a bill single, under seal of assignor, which waives demand and notice. *Jones vs. Lowe*, 333.

**ATTACHMENT IN EQUITY.**

1. An action on the case lies against the plaintiff in an attachment bill for the wrongful suing out of such attachment, and the defendant in the attachment bill is not bound to sue in the first instance on the attachment bond. *Smith vs. Story*, 169.
2. The mere failure to succeed in the prosecution of an attachment bill does not *per se*, put the plaintiff in the wrong, and subject him to a suit for damages for wrongfully suing out such attachment. For the grounds and principles upon which damages may be recovered, resort must be had to the common law action for malicious prosecutions. *Ibid*.



ATTACHMENT IN EQUITY—*Continued.*

3. A creditor decoyed the slave of a non-resident debtor into the state of Tennessee for the purpose of having him subjected to the satisfaction of his debt by attachment: Held, that a levy of the attachment upon the slave so decoyed into the state, did not give the court jurisdiction, and the court upon the dismissal of the attachment bill had the power to order the slave to be carried to the state line and delivered to the debtor or agent. *Timmons vs. Garrison*, 148.
4. The execution of a bond as required by statute is a necessary prerequisite to the issuance of an attachment bill; and where the bond is not such as is required by the statute, it is the same thing as though there was no bond, and in either case, a motion to dismiss is the proper remedy. *Bank of Alabama vs. Fitzpatrick*, 311.
5. The question of the right of complainant to amend an attachment bond, cannot be made in the supreme court, unless a motion to amend was made in the chancery court. *Ibid.*
6. The 8th section of the act of 1836, chap. 43, giving an attachment in equity to an accommodation endorser or security against the principal, does not confer the remedy on a subsequent endorser against a prior endorser. *Turner vs. Newman*, 329.
7. A court of chancery has no power to impound the property of the defendant, who is about to remove the same beyond the jurisdiction of the court, for the purpose of holding it to satisfy the judgment of a court of law.—*Union Bank vs. Newman*, 320.
8. Where an attachment bill states the amount of the defendant's indebtedness, it is not necessary the affidavit should state it. *Foster vs. Hall & Eaton*, 346.
9. The term domicile has a more extensive signification than the term residence. In addition to a residence, it embraces within its meaning the intention of making *that residence* the home of the party. *Ibid.*
10. If the complainant in an attachment bill fail to state in his bill or affidavit attached thereto the amount of the defendant's indebtedness; or if defendant be not a non-resident, and the defendant answers, he waives those objections. They are matters which should be pleaded in abatement. *Ibid.*

ATTACHMENT IN EQUITY—*Continued.*

11. The filing of an attachment bill by one member of a firm against the others, dissolves the firm: not so where a creditor files the bill and attaches the property of the firm. *Ibid.*
12. A corporation, foreign or domestic, can sue or be sued under the attachment laws of the state of Tennessee. *Union Bank vs. United States Bank*, 369.
13. The creditor of a non-resident may attach a fund in his own hands, or a sum of money due from him to such non-resident, where the note is in the hands of the non-resident's agent, or a fraudulent transferee within the jurisdiction of the court, and may subject the same to the satisfaction of his debt. *Boyd vs. Bayless*, 386.

## ATTORNEY.

An attorney is an officer of the court, and when he institutes a suit the presumption is that he is duly authorized to do so; and therefore a power of attorney not authenticated, a letter, or any parol evidence which raises a reasonable presumption of the existence of authority, is sufficient. *Rogers vs. Lessees of Rebecca Park*, 480.

## AWARD.

1. In an action of assumpsit the defendant pleaded non-assumpsit, statute of limitations, and set-off. "The cause" was referred "to the award and arbitrament" of three persons, whose award was to be "the judgment of the court." The arbitrators awarded, that "defendant recover of the plaintiff the sum of \$150," and judgment was entered up accordingly: Held, that this judgment was erroneous. The defendant demanded nothing in the suit, and the arbitrators were clothed with authority to determine, not all the matters in dispute between the parties, but the matter in controversy involved in the suit. *Kincaid vs. Smith*, 151.
2. Where the matters involved in a suit were submitted to arbitration, with an agreement of record, that the award should be the judgment of the court, and the arbitrators awarded \$150 to the defendant, and this was made the judgment of the court: Held, that the court had no power to enter up judgment for that sum: it had power to enter up judgment for the defendant, as the award determined that defendant owed plaintiff nothing.—*Ibid.*

**BAIL.**

See **RECOGNIZANCE.**

**BONDS, STATUTORY.**

1. Where a bond was given to the governor and his successors in office by a clerk, which was not a statutory bond; held, that no action lay in the name of the successor: but the bond being a good common law bond, the action should be brought in the name of the personal representative of the deceased governor. *Jones vs. Wiley*, 146.
2. The plaintiff declared upon a constable's bond, and made profert of the original. On oyer craved, he produced a copy, and the defendant demurred for a variance: Held, that the demurrer was sustainable. The fact, that during the argument of the demurrer the original was brought into court, would make no difference. *Jones vs. Simmons*, 314.
3. A declaration in covenant on a constable's bond, averred the execution of a bond payable to "N. Cannon, for his life, and his successor in office:" Held, that, as exhibited in the declaration, this was not a good statutory bond, but vested in the personal representatives of Cannon the right to sue. *Cannon vs. Hollis*, 334.
4. Where a constable's bond is taken, payable to the governor for the time being and his successors in office, the right to sue vests in the successor, and not in the personal representative of the deceased; and if the bond be not statutory, and suit be brought in the name of the personal representative, the facts which give the right to the personal representative to sue must be exhibited in the declaration, or a demurrer lies. *Cannon vs. Snowden*, 360.
5. In covenant on a constable's bond, the breach was, that a constable collected money from Davis, and failed to pay it over. The proof was, that he collected it from Davis and another. Held, that the breach was sufficiently proved. *Michie vs. The Governor*, 486.

**BOUNDARY.**

1. A call for course and distance must yield to a call for natural objects. *Massengill vs. Boyles*, 205.
2. Parol evidence is not admissible to control the description of land in a grant, unless monuments of boundary were made at the time of the execution of the grant. *Ibid.*

## CASE.

1. Lies against an innkeeper for neglect. See *Dickerson vs. Rogers*, 179.
2. Lies against plaintiff on an attachment bill for wrongfully suing out such attachment. *Smith vs. Story*, 169.

## CHANCERY.

1. A locative interest is an equity. *Hopkins vs. Toel's heirs*, 46.
2. When chancery will enjoin the payment of purchase money upon breach of covenant of seizin. *Ingram vs. Morgan*, 66.
3. Equity between indorsers. See *Applewhite vs. Shaw*, 93.
4. In the absence of fraud or eviction, the vendee of real estate in possession under a deed with covenants of general or special warranty, is entitled to no equitable relief on account of outstanding encumbrances or adverse title. *Elliott vs. Thompson*, 99.
5. Where there is a sale of a slave by bill of sale, with warranty of soundness of body or mind, a court of chancery has no jurisdiction, unless the warranty be fraudulent. In the absence of fraud, the remedy is by action at law on the warranty. *Belew vs. Clark*, 506.
6. Where the intellect of a slave is warranted to be sound, and the fact of soundness is doubtful, a court of chancery has no jurisdiction. The question of fact in such a case must be submitted to a jury. *Ibid.*
7. Jurisdiction of chancery to declare void entries and grants, 157.
8. Partition bill: when it does not operate as an estoppel; and when partition will not be made, 177.
9. When a court of chancery will decree an account against an agent, 183.
10. What constitutes a resulting trust which will be set up in chancery, 234, 417.
11. Where a bill of interpleader is filed, a court of chancery will not actively interfere to dispose of a fund, except in favor of one who, either from proof or from a *pro confesso* judgment, appears best entitled. *Pillow vs. Aldridge*, 287.

CHANCERY—*Continued.*

12. Jurisdiction of chancery to enforce reconveyance on payment of redemption money, 325.
13. A court of chancery has no power to impound the property of the defendant, who is about to remove the same beyond the jurisdiction of the court, for the purpose of holding it to satisfy the judgment of a court of law.—*Union Bank vs. Newman*, 330.
14. The creditor of a non-resident may attach a fund in his own hands, or a sum of money due from him to such non-resident, where the note is in the hands of the non-resident's agent, or a fraudulent transferee within the jurisdiction of the court, and may subject the same to the satisfaction of his debt. *Boyd vs. Bayless*, 286.

## CONSTABLE.

1. A constable who receives a note and executes his receipt for the collection of it, has the power to sue out a warrant, prosecute the suit to judgment, take out execution, receive the money and execute a binding and valid receipt to the defendant in the execution: but he cannot, by virtue of his agency, or as an officer, receive any thing from the defendant but money; and if he do, it is not a discharge of the execution. *Cooney vs. Wade*, 444.

See BOND, STATUTORY.

See SHERIFF. SURETIES.

## CONSTITUTIONAL LAW.

1. The right of a creditor to imprison the body of a debtor existing at the time of the formation of the contract is no part of the contract. It is a remedy given by law for the enforcement of the contract, and may be repealed. The legislature may vary the nature and extent of the remedies and prescribe the times and modes in which remedies shall be pursued; yet have no power to abolish all the remedies existing at the time the contract was made, so as to leave the creditor no redress. *Woodfin vs. Hooper*, 13.
2. See *Williams vs. Karnes*, 9.
3. To the jury belongs the province of judging of the credibility of witnesses and ascertaining the truth of contested statements; yet this must be done by deliberate ex-

CONSTITUTIONAL LAW—*Continued.*

amination of the weight of the respective characters of the witnesses and the consistency and probability of their statements, and not by experiments, such as sending the constable out of the room, closing the door, and then talking, with a view to ascertain whether their voices could be heard out of doors; or running, with a view to ascertain whether their tracks would be longer or shorter than when walking, and the like. *Jim vs. The State*, 289.

4. The legislature have the constitutional power to exclude corporations from becoming purchasers of the public domain. *The State vs. Nashville University*, 157.
5. A clause in the constitution of the state of Mississippi declares, that the introduction of slaves into that state "as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." Held, that this was, *per se*, an inhibition without the aid of legislative enactments. *Yerger vs. Rains*, 259.
6. The legislature have no power to extend the obligation of bail to a more remote day than that mentioned in the recognizance. *The State vs. Edwards*, 226.
7. The 9th section of the 6th article of the constitution provides, that judges "shall not charge the jury with respect to matters of fact, but may state the testimony." Held, that this clause vests in the judges a legal discretion to state the testimony or not, as the circumstances may require. The mere refusal to state the facts sworn to by the different witnesses, is not *ipso facto* error. *Ivey vs. Hodges*, 154.
8. Where the testimony is conflicting and difficult of recollection and comprehension, and a controversy arises as to the statements of the witnesses, it is the duty of the court to recall the witnesses or state their testimony; and a refusal to do so, where injury did or might be necessarily supposed to arise from the non-exercise of the power, is error, for which the judgment should be reversed. *Ibid.*
9. The judge has no right to declare what is proved, but simply to state what is sworn to. The truth of the statements of witnesses, and the deductions to be drawn therefrom, must be left to the jury. *Ibid.*

## CONTINUANCE.

1. The granting or refusal of a continuance is discretionary in the circuit court, and the proceeding of the court will not be reversed in such cases, unless a palpably clear case of injustice is made out. *Jarnagin vs. Atkinson*, 470.
2. In an action for slander the defendant pleaded justification, and after the testimony was submitted to the jury the defendant moved the court to amend his plea of justification, so as to embrace any speaking of the words imputed before action brought. The defendant insisted that the amendment should be allowed only on condition of a mistrial and continuance. The court allowed the amendment without the condition: Held, that this was erroneous. The amendment should have been allowed, a mistrial entered, and the cause continued.—*Fowlks vs. Long*, 511.

## CORPORATIONS.

1. The legislature has the constitutional power to exclude corporations from becoming purchasers of the public domain. *The State vs. Nashville University*, 157.
2. The Nashville University by its charter is empowered "to have, receive and enjoy lands, tenements, &c." The act entitled "An act to dispose of the lands in the Ocoee district," (1837-8, ch. 2, sec. 2,) after the expiration of a given time during which occupants had a preference right of entry, subjected the land to entry by "any person or persons wishing to make the same." The Nashville University entered lands in the Ocoee district. Held, that the word "person" embraced corporations; and the Nashville University having the power to "have, receive and enjoy lands," had the right to enter lands in the Ocoee district. *Ibid.*
3. The Nashville University having the right to enter lands as natural persons, and also having the right to the proceeds of the sale of two half townships, the entry taker permitted the University to enter the said land without the payment of the money required by law from other enterers, the University giving its receipt to the state for so much money, as the proceeds of the sale of said land: Held, that the entries and grants thereupon were legal against the state. *Ibid.*
4. The legislature have the power to authorize companies,

CORPORATIONS—*Continued.*

chartered to construct turnpikes, to construct them on existing public roads; and the constructing of such turnpikes abolishes the old roads on which they are located, or which run parallel with and adjoining them. *Nolensville Turnpike Company vs. Baker*, 315.

5. A corporation, foreign or domestic, can sue or be sued under the attachment laws of the state of Tennessee. *Union Bank vs. United States Bank*, 369.
6. A corporation can exercise no powers but those which are expressly conferred upon it by the charter, or those which are necessary to enable it to carry into effect the purposes for which it was created. *Hopkins vs. Gallatin Turnpike Company*, 403.
7. A corporation has power to make a deed assigning its effects to a trustee for the benefit of creditors. *Ibid.*
8. It is not necessary that the officer of a corporation making a deed on behalf of the corporation should be authorized by power of attorney to affix the seal of the corporation. *Ibid.*
9. Where the president of a corporation makes a deed on behalf of the corporation and affixes the seal of the corporation thereto, it will be presumed, in the absence of proof, that he was duly authorized by a vote of the board to make the deed. *Ibid.*
10. A corporation agreed with certain creditors, that if they would take stock in the company, their debts should be paid in bonds of the state of Tennessee, which the company would procure, provided they would take them at not less than eighty cents in the dollar. They subscribed. No order of the board was made for the assignment or delivery of the bonds to the creditors, and no assent on the part of the creditors had been made to take them at eighty cents in the dollar. The property therefore remained in the company, and the bonds were subject to the lien of the attachment. *Ibid.*
11. The legislature provided, that the state should subscribe for one half of the stock in all incorporated rail road or turnpike companies; and also provided, that the state should have a lien on the property of the company to the extent of money advanced by the state as a corporator, for the purpose of securing the payment of a similar



CORPORATIONS—*Continued.*

amount by the other corporators. The state subscribed for one half of the stock of the Lagrange and Memphis Rail Road Company, and paid it. Held, that this lien attached to the property of the company, and that the property could not be seized by *fi. fa.* at the instance of creditors, until the extinguishment of the lien by the payment of the stock. *The State vs. The Lagrange and Memphis Rail Road*, 488.

## COVENANT.

See BOND.

1. In the absence of fraud or eviction, the vendee of real estate, in possession under a deed with covenants of general and special warranty, is entitled to no equitable relief on account of outstanding encumbrances or adverse title. *Elliott vs. Thompson*, 99.
2. It is now well settled, that the vendee of real estate, with covenant of warranty, on eviction, recovers of the vendor the consideration money and interest. *Ibid.*
3. Mays, for a stipulated consideration, covenanted to deliver a given number of barrels of corn to Jennings, and Jennings bound himself to furnish sacks to put the corn in. Jennings delivered the sacks, which were received, and Mays failed to deliver the corn or return the sacks. Held, that in a suit on the covenant for a breach thereof for not delivering the corn *sacked*, the value of the sacks detained was proper to be considered in estimating the damages. *Mays vs. Jennings*, 102.
4. Where a covenant was made for the delivery of a given number of barrels of corn, the quantity should be ascertained by the bushel measure as fixed by law, and not by weight and evidence of a neighborhood custom, which cannot be permitted to control the law. *Ibid.*
5. Courts in the construction of covenants, should favor that construction which is obviously most just. *Halloway vs. Lacy*.
6. Lacy agreed, by covenant, to serve Halloway as overseer for a term of years, for the sum of \$200: Held, that this was a dependent covenant, and that Lacy had no right of action against Halloway till he had performed the services. *Ibid.*

COVENANT—*Continued.*

7. Trigg covenanted to deliver to Hally "his growing crop of cotton in good order, put up in Kentucky or India bagging, well and sufficiently tied with rope, and said cotton to be well handled." Held, that the covenant did not bind Trigg by absolute engagement to deliver cotton free from stain and of fair quality. It bound him to use the utmost care and attention in picking, ginning and baling the cotton, but did not guaranty against the inevitable casualties of the seasons. *Trigg vs. Hally*, 493.
8. McAlister bound himself by covenant, to pay for Robinson certain debts due by Robinson to Marberry. Marberry instituted an action of covenant against McAlister on the instrument: Held, that he had no legal interest therein, and that the action would not lie.
9. A covenant of seizin made by one who has no title, gives a right of action so soon as the covenant is made, and no eviction as in covenants of warranty is necessary; where the vendor is insolvent, a court of chancery will enjoin the collection of the purchase money. *Ingram vs. Morgan, Garrett et al.* 66.

## COURTS.

1. A court has the power, at any time during the term, to alter, modify or overrule its decrees or judgments.—*Timmons vs. Garrison*, 148.
2. Clerical errors may be corrected by the court at a subsequent term, but cannot be corrected from the memory of the judge, or from written evidence filed in the cause: they can only be corrected by proceedings of record. *Ridgeway vs. Ward*, 430.

## CRIMINAL LAW.

1. In all cases of treason and felony, defendant must be present when the verdict is rendered; and if he be not present, the verdict cannot be permitted to stand.—*Clark vs. The State*, 254.

See INDICTMENT. PRESENTMENT. EVIDENCE. JURY.  
NEW TRIAL. VERDICT.

## COUNTERFEITING.

2. When the offence charged, is the passing counterfeit coins, the guilty knowledge of the defendant being-in

**CRIMINAL LAW—Continued.**

issue, proof that the defendant passed other counterfeit coins of the same character, about the same time, and the circumstances under which they were passed by him, as that witness won them at a gambling house, is competent evidence. *Powers vs. The State*, 274.

**LARCENY.**

3. Where a circuit judge orders a prosecution *ex officio*, it is not necessary that the order should show that it was made upon an examination of witnesses. If the order be made, it will be presumed to have been made as the statute directs. *Simpson vs. The State*, 456.
4. No indictment for larceny lies in the courts of this state, where the property has been stolen in another state and brought by the thief into this state. *Ibid.*
5. Where the thief is found in possession of the goods in this state, the presumption is, that the larceny was committed in the state; and if he wishes to evade a trial, he must show they were stolen in another. *Ibid.*
6. The 5th and 6th sections of the act establishing a criminal court for certain civil districts in the county of Shelby, confer exclusive jurisdiction of all offences committed after the passage of the act; and expressly reserves to the circuit court jurisdiction of all offences committed prior to the passage of the act. The 10th section of the act repeals all laws giving to the circuit court jurisdiction of offences. Held, that the several sections must be construed in reference to each other, and that the 10th section repealed all the existing laws, giving jurisdiction to the circuit court of offences, except jurisdiction of the class of cases reserved in the 5th and 6th sections. *Davis vs. The State*, 427.

**MURDER.**

7. The cases of *Mitchell vs. The State*, 5 Yerger, 340, and *Dale vs. The State*, 10 Yerger, 551, defining murder in the first degree under the penal code of 1829, approved. *Swan vs. The State*, 136.
8. The characteristic quality of murder in the first degree, and which distinguishes it from murder in the second degree, or any other homicide, is the existence, at the time of the death of the assailed, of a settled purpose

CRIMINAL LAW—*Continued.*

and a fixed deliberate design on the part of the assailant, that his assault should produce death. The length of time which the assailant deliberates on his intention, is not material. *Ibid.*

9. Drunkenness is no excuse for, or justification of crime. Martin & Yerger, 157, *Cornwall vs. The State.* *Ibid.*
10. Where the nature and essence of the crime is made by law to depend on the peculiar state and condition of the criminal's mind at the time and with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offence, but to show that it was not committed.—*Ibid.*
11. In an indictment for murder in the first degree, the chief ingredient in the offence consisting in a deliberately formed design to take life, evidence of drunkenness to an extent which absolutely incapacitates the defendant from forming such a deliberate and premeditated design, is admissible to the jury, to show that the offence has not been committed. *Ibid.*
12. An accessory cannot be tried without his consent before the conviction of the principal, unless they are tried together. *Whitehead vs. The State*, 278.  
See ACCESSORY. *Pybass vs. The State*, 442.
13. Stone was indicted for the murder of Mitchell. On the trial, the attorney general offered proof going to establish the fact, that Stone had, some short time before the murder of Mitchell, set fire to the house of Mitchell in the night. The proof was offered for the purpose of showing Stone to have been the perpetrator of the murder. Held, that the proof was not admissible. *Stone vs. The State*, 27.
14. Stone was indicted for the murder of Mitchell; and proof was admitted, showing that Stone had beat his wife and forced her to abandon his house and seek refuge under the protection of the deceased. Held, that the protection afforded by the deceased was an aggravating circumstance to the prisoner, and therefore proper proof of malice prepense on the part of the prisoner, and that the incidental abuse accompanying and perhaps inducing the flight of the wife, is not such proof upon a separate criminal charge as vitiates the verdict. *Ibid.*

CRIMINAL LAW—*Continued.*

RAPE.

15. The court charged the jury, that if the female assaulted consented through fear, or consented after the fact, or was taken at first with her consent, if she was afterwards forced, the offence was committed. Held, that there was no error in this charge. *Wright vs. The State*, 194.

MISDEMEANORS.

AFFRAY.

16. An indictment for an affray must charge *a fighting by two or more persons* in a public place. It will not be good if it only charge, that they "made an affray." It must charge the facts which constitute the offence, and not merely the technical designation thereof. *The State vs. Priddy and Ray*, 429.

BETTING ON ELECTIONS.

17. The act of 1841, entitled "An act to suppress illegal voting," authorizes grand juries to bring before them, by subpoena, the judges, inspectors, clerks and officers of elections, for the purpose of presenting offences against the act. It does not extend the power to the jury to bring forward any witnesses except those specifically named in the act. *Deshazo vs. The State*, 275.

See GAMING.

18. The act of 1831, ch. 103, sec. 3, prohibits slaves from practicing medicine, under all circumstances. *Macon vs. The State*, 421.
19. An indictment which charges that the defendant with force and arms took a negro slave from the field and possession of the owner, does not charge an indictable offence. *The State vs. Watkins*, 256.
20. The act of 1837, ch. 125, sec. 2, subjecting executors, administrators and guardians to indictment, in the event of a failure, upon notification, to settle their accounts once in each year, before the clerk of the county court, does not apply to cases where a final settlement has been made of all the estate in their hands. *The State vs. Parrish*, 285.

**DEBT.**

A joint action of debt lies against the persons who have bound themselves by the same writing, to pay a sum of money, the one with, and the other without seal. *Oldham and Baily vs. Hunt*, 332.

**DEPUTY SHERIFF.**

1. The act of 1829, chapter 11, sec. 1, gives to the sheriff a remedy by motion against his deputy and sureties, upon ten days' notice, when he shall have "become liable to pay money for the default or misconduct of his deputy." Held, that a just construction of this act requires that the default or misconduct of the deputy should be judicially ascertained before the sheriff should have his remedy. *Patterson vs. Coleman*, 64.
2. Where a sheriff has paid money for his deputy he can recover a judgment against the deputy by motion, without having the extent of such sheriff's liability ascertained by a judgment against him. *Jarnagin vs. Atkinson*, 474.
3. The sheriff is by law the collector of state and county taxes, and a bond given by a deputy sheriff faithfully to discharge the duties of a deputy, embraces a defalcation in not paying over taxes collected by such deputy. *Ibid.*

**DIVORCE.**

A wife is entitled to a divorce where the conduct of her husband is such, that it is unsafe for her to live with him; or where he is in the habit of offering such indignities to her as render her condition intolerable. *Payne vs. Payne*, 500.

**DRUNKENNESS.**

Drunkenness is no excuse for, or justification of crime. *Martin & Yerger*, 157, *Cornwall vs. The State*. *Swan vs. The State*, 136.

**EASEMENTS.**

When extinguished. See *Nolensville Turnpike Company vs. Baker*, 315.

## EJECTMENT.

1. A locative interest in land is an equitable, and not legal interest; and therefore cannot be noticed in an action of ejectment. *Hopkins vs. Toel's heirs*, 46.
2. The statutes of this state, authorizing partition of real estate, apply to the owners of legal, and not equitable estates; and therefore partition cannot be made of a locative interest, where the locator has acquired no title by conveyance, or by bill under the act of 1829, ch. 84. *Ibid.*
3. A partition bill filed by one heir against the others, and a decree thereupon for partition, does not estop any one of the others from asserting his claim to any portion of the land by action of ejectment. A bill in chancery for partition is not a bill to settle conflicting rights, but to divide that which belongs to tenants in common or joint tenants amongst them; and if the title be disputed, partition will not be made until the dispute is settled by suit for that purpose instituted. *Nicely vs. Boyles*, 177.
4. Entries and grants are void and may be resisted in a trial in ejectment where there is want of property in the grantor, or want of power in the officers appointed by the government to receive the entries and issue the grants. *Crutchfield vs. Hammock*, 203.
5. The surveyor of the Ocoee district included in his survey of the Ocoee district land lying in the Hiwassee district, and so laid the same down in the general plan of the district. The lands were entered and granted as lands lying in the Ocoee district. Held, that the grants were void. *Ibid.*
6. A call for course and distance must yield to a call for natural objects. *Massengill vs. Boyle*, 205.
7. Parol evidence is not admissible to control the description of land in a grant, unless monuments of boundary were made at the time of the execution of the grant. *Ibid.*
8. Defendant produced a plat of survey, and asked a witness if he did not make it, to which he replied he did. Held, that it was proper to permit the witness to examine the plat, so as to refresh his memory as to the period he made it, and whether for plaintiff or defendant; but if he did not know when, or at whose instance it was

EJECTMENT—*Continued.*

made, it was not evidence. *Mitchell vs. Churchman's lessee*, 218.

9. In order that the possession of one claimant shall neutralize the possession of another, both must be in actual possession of some part of the disputed land. *Ibid.*
10. If defendant had actual adverse possession of part of a hundred acre tract when it was sold by Glass, he was in adverse possession of the entire tract, and the sale of Glass would be champertous and void as to the whole tract. *Ibid.*
11. The plaintiffs claim as heirs of Benjamin Steadman; they proved that they are the heirs of Sarah Steadman, and that Sarah was the daughter of Benjamin. There is nothing which casts any doubt on the legitimacy of Sarah, nor any proof that Benjamin Steadman was ever married. Held, that the marriage of Benjamin Steadman and the heirship of the plaintiffs was sufficiently established; Benjamin having been long dead, and the controversy not being between persons claiming under conflicting claims of heirship. *Rogers vs. Lessees of Rebecca Park*, 480.

## ENDORSER.

See NEGOTIABLE PAPER.

## ENTRY.

1. Under what circumstances corporations may make entries. *The State vs. Nashville University*, 157.
2. Entries are void when there is want of property in the grantor or the officers. *Crutchfield vs. Hammock*, 203.
3. Where a person applied for an extension entry, the production of his grant or deed for less than two hundred acres of land, is sufficient *prima facie* proof, that he did not own more. Those who assert that he owns more, must prove it, if they wish to defeat his application. *Chester vs. Wood and Cole*, 435.
4. Where a party applied for an extension entry, and it was refused by the entry taker, on the ground, that the land had been once appropriated by warrant, and did not appear that it had ever been vacated. Held, that the absence of proof of the fact would not defeat the appli-



ENTRY—*Continued.*

- cation. The right to appropriate it depends on the fact, that the land was vacant at the time. *Ibid.*
5. The office of a writ of *mandamus* is to enforce the performance of official duty, and the officer cannot be commanded to do that which it was not lawful for him to do without such command. *Gillespie vs. Wood & Douglass*, 437.
  6. Horn secured, in his own name, an occupancy according to law, under a contract with Rudisil, that such occupancy, when secured, should be transferred to Rudisil. Horn sold and transferred it to Douglass, and Douglass entered the land by warrant. Held, that the legal right was in Douglass; and that if Rudisil had an equitable right to appropriate the land, that right could only be established and enforced in a court of chancery, and not by *mandamus*. *Ibid.*
  7. Where a person is the owner of a small tract, under two hundred acres, by entry, grant or deed, he may extend it by entry to two hundred acres. The acts of assembly authorizing such extension entries do not require an actual residence of the party on the small tract. *Gardner vs. Bright*, 503.
  8. Where a person tendered a location to the entry taker, which the entry taker illegally refused to receive; this did not constitute the applicant the owner of the land proposed to be entered, so as to authorize an extension entry. He must be the owner by the completion of the steps necessary to constitute a valid entry before he can, by *mandamus*, compel the entry taker to receive this extension entry. *Ibid.*

## EVIDENCE, QUESTIONS OF.

1. The defendant, with a view to prove a set-off, asked a witness what credits he had seen entered on the books of the plaintiffs to the defendant. The plaintiffs objected to this question, but the court overruled the objection and ordered the witness to answer it. The plaintiffs thereupon produced and proved copies of the defendant's accounts, debits and credits, to which the defendant objected. This was overruled, and defendant thereupon moved, that all the testimony given in on the books be excluded, which motion prevailed. Held, that this

EVIDENCE, QUESTIONS OF—*Continued.*

- was error. The books of the plaintiffs had become competent testimony by the course of examination of the defendant; and having been legally heard, it was illegally excluded. *Brown & Herndon vs. Williams*, 22.
2. Stone was indicted for the murder of Mitchell. On the trial, the attorney general offered proof going to establish the fact, that Stone had, some short time before the murder of Mitchell, set fire to the house of Mitchell in the night. The proof was offered for the purpose of proving Stone to have been the perpetrator of the murder. Held, that the proof was not admissible. *Stone vs. The State*, 27.
  3. Where illegal testimony is permitted to go to the jury without objection either on its introduction or in the argument of the case, its illegality is waived, and a new trial will not be granted in consequence of its admission. *Ibid.*
  4. Stone was indicted for the murder of Mitchell; and proof was admitted, showing that Stone had beat his wife and forced her to abandon his house and seek refuge under the protection of the deceased. Held, that the protection afforded by the deceased was an aggravating circumstance to the prisoner, and therefore proper proof of malice prepense on the part of the prisoner, and that the incidental abuse accompanying and perhaps inducing the flight of the wife, is not such proof upon a separate criminal charge as vitiates the verdict. *Ibid.*
  5. The certificate of a notary, that he gave due notice to an endorser, is not admissible evidence, unless it be made at the time of the protest, and be made "in or on the protest." *Winchester vs. Winchester*, 51.
  6. Where a covenant was made for the delivery of a given number of barrels of corn, the quantity should be ascertained by the bushel measure as fixed by law, and not by weight and evidence of a neighborhood custom, which cannot be permitted to control the law. *Mays vs. Jennings*, 102.
  7. It is a fixed rule of practice in the introduction of testimony, that the plaintiff shall first bring forward all the testimony which goes to establish his claim; the defendant shall then introduce his proof upon matters of defence and his testimony rebutting the proof adduced by

EVIDENCE, QUESTIONS OF—*Continued.*

- the plaintiff; then the plaintiff, his proof, rebutting that of the defendant. After the plaintiff has introduced his proof to establish his claim, and the testimony of the defendant has been heard, the plaintiff can introduce no testimony in chief. The court has the discretionary power to relax this rule, where justice requires it should be done; but the judgment of the court will not be reversed for the relaxation of the rule, or refusal to relax it, unless the error be gross and palpable. *Smith vs. Britton*, 201.
8. The plaintiff gave notice of an intended motion against a constable for the non-return of an execution against James Lowry. On the trial he offered judgment and execution against James and Almon Lowry. Held, that they were admissible: the same certainty is not required in proof as in pleading. *McMullen vs. Goodman*, 239.
  9. Cumulative evidence is evidence which speaks to facts, in relation to which there was evidence on the trial, and a new trial ought not to be granted on such evidence, though it be new and material. *McGavock vs. Brown & Williams*, 251.
  10. When the offence charged, is the passing counterfeit coins, the guilty knowledge of the defendant being in issue, proof that the defendant passed other counterfeit coins of the same character, about the same time, and the circumstances under which they were passed by him, as that witness won them at a gambling house, is competent evidence. *Powers vs. The State*, 274.
  11. When the witness of plaintiff in an action of slander, under the plea of justification, stated in reply to interrogatories put to him by the plaintiff respecting the plaintiff's character, that some persons spoke well of him, and some spoke ill of him; and being asked by plaintiff who spoke ill of him, said J. M. charged him with a specific offence: Held, that it became, *under the circumstances*, material whether J. M. did make the charge or not, and plaintiff had the right to prove by J. M. that he did not make it. *McLarin vs. The State*, 381.
  12. Under the plea of *non est factum*, involving the existence of a partnership, the declaration of the defendant to third

EVIDENCE, QUESTIONS OF—*Continued.*

persons before the execution of the instrument in question, that no partnership existed, is not evidence. What the defendant said to him when the note was offered to him for payment, would be evidence; such declaration being a part of the *res gestæ*. . *England vs. Burt*, 399.

13. The plaintiffs claim as heirs of Benjamin Steadman; they proved that they are the heirs of Sarah Steadman, and that Sarah was the daughter of Benjamin. There is nothing which casts any doubt on the legitimacy of Sarah, nor any proof that Benjamin Steadman was ever married. Held, that the marriage of Benjamin Steadman and the heirship of the plaintiffs was sufficiently established; Benjamin having been long dead, and the controversy not being between persons claiming under conflicting claims of heirship. *Rogers vs. Lessees of Rebecca Park*, 480.
14. The hearsay testimony of the living members of a family, and the hearsay of its deceased members, as to who were their ancestors, and as to the periods of their deaths, are entitled to more weight than the hearsay of persons unconnected with the family. *Saunders vs. Fuller*, 516.

See WITNESS.

## FIXTURES.

A cotton gin erected in a house and attached to the house by nails and braces, is a part of the freehold, and passes by the deed of vendor. *Degraffenreid vs. Scruggs*, 451.

## FRAUD.

1. The defendant in payment of a horse delivered bank bills to plaintiff, which were known to defendant to be worthless at the time, and unknown to the plaintiff, with an agreement that if the notes were not returned in a given time, the defendant should not be bound to receive them: Held, that it was a fraud, and that plaintiff had a right to recover the value of the horse, though he did not return the notes within the time limited.—*Smith vs. Click*, 186.
2. See *Union Bank vs. Osborne*, 413.

## FRAUDULENT CONVEYANCES.

1. A deed which conveys personal property, consumable in the use, is void on its face against creditors, on the ground that it furnishes intrinsic evidence of an intention to hinder and delay them in the collection of their debts: a reservation, however, in favor of existing creditors repels all evidence of a fraudulent purpose, and renders such a deed valid. *Hunter vs. Foster*, 211.
2. The fact that a wife and child stand in silence by and hear the father and husband claim a part of personal property conveyed in a deed to them, and offer to sell it, cannot affect the validity of their title. *Ibid.*
3. Pleasant Henderson had an undivided equitable interest in certain slaves, which were in the hands of a trustee, to whom they had been conveyed for the benefit of the mother of P. Henderson during her life. During her life P. Henderson, with the intent to delay his creditors, conveyed his interest without consideration to J. M. Henderson: Held, that this conveyance was not void as against the judgment creditors of Pleasant Henderson, because the estate at the time of conveyance was not subject to *feri facias* against P. Henderson, but it communicated the naked legal title on the death of the mother to J. M. Henderson, with a resulting trust for the grantor, P. Henderson, and subject to the claims of his creditors in equity. *Planters' Bank vs. Henderson*, 75.

## GAMING.

1. When a wager is lost and the money or property is paid or delivered, the plaintiff cannot recover it back, except in the cases provided for in the statute of 1799, chap. 8, and in the time therein limited. *Allen vs. Dodd*, 131.
2. Betting on elections is not embraced by the statutes on the subject of gaming, or by that which gives to a party losing the right to recover back his property lost at gaming within ninety days. *Ibid.*
3. An indictment or presentment for gaming must lay some day, as the day on which the offence charged was committed, and the day so stated must be within the time within which the law authorized a prosecution to be commenced. *Anthony vs. The State*, 83.
4. A charge in an indictment for gaming, that the defendant bet "valuable things," is too vague. It must set forth and describe the valuable thing bet. *Ibid.*

## GARNISHEE.

1. The answer of a garnishee is conclusive; and if it be imperfect, the court, upon interrogatories, will compel him to make an amended answer. *Moore vs. Green*, 299.
2. Where a garnishee answers, that he executed a bill single or a note, but does not state who is the owner, no judgment can be rendered against him, because he does not state that he is indebted to the debtor of the attaching creditor. *Ibid.*
3. The facts stated in the answers of several garnishees cannot be put together, to make out a case of liability against one of them. The liability of each rests on his own answer. *Ibid.*

## GRANT.

See EJECTMENT. ENTRY.

## GUARANTY.

A guarantor is not discharged by the want of notice within a reasonable time alone. Before he is discharged, it must also appear that the guarantor suffered loss or damage by the failure to receive notice: in that event he is discharged to the extent of the loss or damage, and no further. *Woodson vs. Moody*, 303.

## HABEAS CORPUS.

1. The father, upon the principles of common law, is entitled to the exclusive custody of his children; and if he have the custody of them, a court of common law will not deprive him of it, except for an abuse of trust, either by improper violence or improper restraint, and such as would justify the issuance of a writ of *habeas corpus* for their protection. *The State on the Relation of Paine vs. Paine*, 523.
2. A court of common law is not bound in a proceeding by *habeas corpus* to deliver the child to the father, where he has not the possession of it, but may act upon its discretion, according to the circumstances of the case. In all such cases, the great leading object should be, the interest and welfare of the child; and therefore, where the child is of sufficient age to judge for itself, the court should leave it to go where it pleases. *Ibid.*

HABEAS CORPUS—*Continued.*

3. The wife has no right by common law to the custody of the children as against the husband, and she cannot be looked to by the court, except so far as she may be considered in reference to the tender age of the children and other considerations, as the most suitable person to have control of them for their benefit. *Ibid.*

## HEARSAY.

The hearsay testimony of the living members of a family, and the hearsay of its deceased members, as to who were their ancestors, and as to the periods of their deaths, are entitled to more weight than the hearsay of persons unconnected with the family. *Saunders vs. Fuller*, 516.

## IMPRISONMENT FOR DEBT.

See CONSTITUTIONAL LAW.

## IMPROVEMENTS.

Herring and Bird took possession of land under a parol purchase from Pollard, and made valuable improvements thereon, intending in good faith to complete the contract. The execution of the contract was frustrated by a disagreement of the parties: Held, that Pollard was liable to account to them for the value of improvements placed on the premises during his occupation of them. *Herring & Bird vs. Pollard's ex'rs.*

## INDEMNIFICATION BOND.

A sheriff or constable is authorized to demand a bond of indemnity from plaintiff in execution before levy, in all cases of disputed title to property; and if it be not given, he may return the *fi. fa.* no property found. He is not bound to take the responsibility of judging of title in any case, where it is disputed. *Saunders & Martin vs. Harris*, 72.

## INDIANS.

The treaty of New Echoto, providing for the removal of the Cherokees west of the Mississippi river, did not dissolve them as a nation east of the Mississippi, nor did it abrogate or suspend the force and operation of the laws of the general government, regulating the inter-

INDIANS—*Continued.*

course with the said Cherokees. These laws continued in force and operation for and during the term of two years, that being the time within which their removal was to be effected. *Morrow vs. Blevins*, 223.

## INDICTMENT.

1. This indictment against an overseer of a road averred, that the road of which he was overseer was ruinous and out of repair; and that it was not measured and mile-marked, and that no posts of durable wood at each mile were set up: Held, that it charged two distinct offences in the same count, and was therefore not a good indictment. *Greenlow vs. The State*, 25.
2. A presentment was made by twelve jurymen under oath and by one acting with them not under oath: Held, that the presentment was void, for it may have been founded on the information of him who was unsworn; *secus*, with regard to an indictment, for it is founded upon proof. *The State vs. Baker*, 12.
3. It is no ground in law, either of demurrer or arrest of judgment, that several distinct felonies of the same degree, though committed by defendant at different times, should be inserted in the same indictment; yet if shown to the court before plea, it is within the discretionary power of the court to quash the indictment, or after plea, to compel the prosecutor to elect on which count he will proceed. *Wright vs. The State*, 194.
4. The indictment charges in one count, that Wright committed a rape on the body of Tabitha Webb, on a given day; and in another, that he on the same day had carnal knowledge of Tabitha Webb, she being under ten years of age: Held, that he was intended to be charged with but one offence. *Ibid.*
5. An indictment which charges that the defendant with force and arms took a negro slave from the field and possession of the owner, does not charge an indictable offence. *The State vs. Watkins*, 256.

## INTERPLEADER.

Where a bill of interpleader is filed, a court of chancery will not interfere to dispose of a fund, except in favor of one who, either from proof or from a *pro confesso* judgment, appears best entitled. *Pillow vs. Aldridge*, 287.



## INTEREST.

The court may charge a trustee with compound interest, who has been guilty of fraud or such gross negligence as to amount to fraud, or where he has funds in his hands and profited by them, and failed to make a frank disclosure; but a mere failure to sue, does not make out a case which comes within the rule. *Torbet's heirs vs. McReynolds*, 215.

## JAILER.

Where a jailer employed a slave, who was committed to jail as a runaway, in the cultivation of his farm, such employment was conversion of the slave, which rendered both the sheriff and the jailer liable in the event of the escape of such slave. *Cain & Horn vs. Kelly*, 472.

## JOINT OWNERS.

Where one joint owner of a chattel sells the entire chattel and delivers possession to the purchaser, it is a conversion, for which trover lies. *Rains vs. McNairy*, 356.

## JUDGMENT.

See JUSTICE OF THE PEACE.

1. There are three cases in which a justice other than he who renders the judgment may issue an execution—1st, in case of vacancy—2d, absence of the justice for three months from his district—3d, temporary absence.—*Hart vs. Fizer*, 48.
2. Where money had been paid under a judgment of a court of competent jurisdiction, it can never be recovered back by another action; the judgment rendered being, so long as it remains in full force, conclusive, to all intents and purposes, of the rights of the parties.—*Kirklan & Hickson vs. Brown's adm'rs.* 174.
3. Williams and McLaughlin were jointly entitled to recover cost from Chaffin, who was the surety for the prosecution of a suit against them, which had failed. A *scire facias* was issued, showing a joint right of recovery, but the verdict and judgment rendered on the *scire facias* were in favor of Williams alone: Held, that the judgment should have been arrested on the motion of defendant. *Chaffin vs. Williams*, 231.

**JUDGMENT—Continued.**

4. Where a judgment is rendered on a verdict without a plea, such judgment is erroneous, and reversible. *Hopson vs. Fountain* 243.
5. A judgment was rendered against two, and being void as to one, it was void as to the other. *Trousdale and Bugg vs. Donnell*, 273.
6. Clerical errors may be corrected by the court at a subsequent term, but cannot be corrected from the memory of the judge, or from written evidence filed in the cause: they can only be corrected by proceedings of record. *Ridgeway vs. Ward*, 430.

**JUDGMENT BY DEFAULT.**

1. A judgment by default admits the cause of action alleged in the declaration, and no proof can be heard to disprove its existence. *Union Bank vs. Hicks, Ewing & Co.* 327.
2. Where an action was brought by the endorsee of a note, which was deposited in bank for collection, against the bank, for neglect in making demand and giving notice to the endorser, whereby he was discharged and the debt lost, a judgment by default admitted the execution of the note, the endorsement, the deposit of the note in bank for collection, and the neglect to give notice. These were all necessary ingredients and indispensable parts of the cause of action, as stated in the declaration. *Ibid.*
3. See *Rainey & Henderson vs. Sanders*, 447.

**JUROR.**

The principles of the case of *McGowen vs. The State*, 9 Yerger, 184; *Payne vs. The State*, 3 Humphreys, 357, recognized. *Wright vs. The State*, 194.

**JURY.**

1. The jury is to determine the weight of the testimony. *Ivey vs. Hodges*, 154.
2. To the jury belongs the province of judging of the credibility of witnesses and ascertaining the truth of contested statements; yet this must be done by a deliberate

**JURY—Continued.**

examination of the weight of the respective characters of witnesses and the consistency and probability of their statements, and not by experiments, such as sending the constable out of the room, closing the door, and then talking, with a view to ascertain whether their voices could be heard out of doors; or running, with a view to ascertain whether their tracks would be longer or shorter than when walking, and the like. *Jim vs. The State*, 289.

**JUSTICE OF THE PEACE.**

1. A justice of the peace has jurisdiction to the extent given by the legislature over money demands, in all cases where, by the terms of the contract; specific articles are to be delivered, or services performed, if such contract ascertain the money value of such services or articles. *Marrigan vs. Page*, 247.
2. A court of law can hear testimony to establish the relation of principal and surety in a sealed instrument, when a party claims his discharge under the act of 1825 as a surety on the ground that the judgment obtained against him as a surety was stayed without his joining in with the principal in procuring the stay. *White vs. Brown*, 292.
3. A justice of the peace has no jurisdiction to render a judgment on an award which exceeds fifty dollars.—*Collins vs. Oliver*, 439.
4. A penal bond for \$100 being dischargeable, by the act of 1801, ch. 6, sec. 66, by the payment of damages, to be assessed by a jury, and costs of suit, is not embraced by the act of 1835, ch. 17, giving a justice of the peace jurisdiction to the extent of one hundred dollars over all debts and demands evidenced by specialty, note, agreement or account, signed by the party to be charged, &c. *Ibid.*
5. Hancock summoned Wood, by warrant, to answer him as assignee of C. S. Brodie, former guardian of C. H. Howard, and offered on trial a note payable to Charles S. Brodie, guardian of Cornelius H. Howard: Held, that there was no variance between the warrant and the note, which should exclude it. *Wood vs. Hancock*, 465.

JUSTICE OF THE PEACE—*Continued.*

6. The warrant is not in lieu of a declaration. It is simply a summons to the defendant to appear and answer, and it may be laid down as a general rule, that whatever may be done in a court of record, by proper pleadings and proof, may be done before a justice of the peace, upon the production of the proof alone. *Ibid.*
7. Where executions were issued on the same day the judgments were rendered by a justice of the peace, upon insufficient affidavit, and were levied upon land and the same was sold by order of the county court; it was held, that the sale was neither void or voidable, but valid. *Stanley vs. Nelson & Dickinson*, 484.
8. Connell, a justice of the peace, rendered a judgment against Hart. Another justice of the peace for the same county, issued a *ca. sa.* thereupon: Held, that in the absence of proof, it will be presumed that this is one of the specified cases in which one justice of the peace was authorized to issue process on judgment rendered by another, and that the *ca. sa.* was regularly issued.—*Hart vs. Fizer*, 48.
9. There are three cases in which a justice other than he who renders the judgment may issue an execution—1st, in case of vacancy—2d, absence of the justice for three months from his district—3d, temporary absence.—*Ibid.*
10. In actions of *indebitatus assumpsit* and debt upon executed contracts, the plaintiff may relinquish part of his claim, with a view to give a justice of the peace jurisdiction, and recover judgment for the balance. The judgment recovered is a bar to a suit for the part relinquished, if pleaded. *Carraway vs. Burton*, 108.

## JUSTICES OF THE PEACE.

See ROAD.

## LARCENY.

See CRIMINAL LAW.

## LAW AND FACT.

See JURY. CONSTITUTIONAL LAW.

## LEVY.

1. A levy was in these words: "Levied on three tracts of land, one containing 300 acres, another 50 acres, and another containing 100 acres, all in the county of Carroll, the property of H. Cozart. See advertisement in the newspapers for description:" Held, that it was void for uncertainty. A reference for description to newspaper advertisements will not do, as they constitute no part of the record of the case. *Taylor's lessee vs. Cozart*, 433.
2. The levy of a *fiery fucias* on personal property vests in the sheriff the legal right to the property for the use of the plaintiff, and the sheriff, after the return of the *fiery fucias*, may sell, and the sale will be valid. *Lester's case*, 383.

## LIBEL.

1. To write concerning a man these words, "I look on him as a rascal, and have watched him for many years," is a libel. Any injurious declaration of another, by writing, or equivalent symbols, is libelous. It does not require the imputation of crime to constitute libel, as in slander. The distinction is founded in the deliberate malignity displayed by reducing the offensive matter to writing. *Williams vs. Karnes*, 9.
2. The act of 1741, making the offence of mismarking triable before a justice of the peace, and punishing the first offence by a pecuniary penalty, and the second by stripes, is unconstitutional, and void. To charge a person with an offence not indictable, or if indictable not subject to infamous or corporal punishment, does not subject the person making the charge to an action for slander, without proof of special damage. *Ibid.*
3. Karnes said of Williams; "Williams altered the ear mark of my hog from mine to his, or procured it to be done:" Held, that these words did not *per se* import, that the mismarking was done for the purpose of fraudulently appropriating the property, and therefore a declaration was demurrable without an averment that Karnes fraudulently intended to appropriate. *Ibid.*

## LIEN.

## LIEN ON REAL ESTATE FOR PURCHASE MONEY.

1. See *Uzzell vs. Mack*, 319.

LIEN—*Continued.*

## LIEN OF A JUDGMENT.

2. The lien of a judgment upon real estate given by the act of 1831, chapter 90, section 7, is not lost or suspended by an agreement of record between plaintiff and defendant to stay execution for four months. *Love vs. Harper*, 113.
3. Plaintiff and defendant agreed to stay execution for four months, and the execution was returned, stayed by order of the plaintiff: Held, that the lien of the judgment upon the real estate of the defendant was not lost or suspended by such stay of execution, so as to give other judgments, recovered at the same time, a preference. *Ibid.*

## LIEN OF A PARTNER ON PARTNERSHIP EFFECTS.

4. See *Foster vs. Eaton & Hall*, 346.

## LIEN OF FIERI FACIAS.

5. A *fiери facias* issued after the death of the defendant, on a judgment rendered previous thereto, relates to the test, and binds the goods of the defendant from that date. *Black vs. Planters' Bank*, 367.
6. The act of 1833, abolishing different grades of dignity in the debts against the estates of deceased persons, does not affect the lien of a *fiери facias* which attaches before death of the defendant. *Ibid.*
7. The lien of a *fiери facias* does not bind goods, the title of which is not in the execution debtor, and as a *bona fide* purchaser from a fraudulent vendee takes the property discharged of the operation of the statute of frauds, the lien of a *fiери facias* cannot attach to it upon the assumption that it continued, by the statute of frauds, the property of the original fraudulent vendor. *Ibid.*

## LIEN OF ATTACHMENT.

See *Hopkins vs. The Gallatin Turnpike Company*, 402.

## LIEN OF THE STATE ON PROPERTY OF TURNPIKE AND RAIL ROAD COMPANIES.

See *The State vs. The Lagrange & Memphis Rail Road*, 488.

**LIFE ESTATE.**

Smith bequeathed a life estate in slaves to his wife Catharine, and the remainder to his daughter Nancy, and died. Heaton married Nancy, and died, leaving his wife Nancy and her mother, Catharine, surviving. Nancy intermarried with Moorely, and thereafter Catharine died, and then Moorely: Held, that the slaves belonged to the representatives of Moorely; and though Catharine may have, by gift, surrendered her life estate to Heaton, such gift, no more than a sale under similar circumstances, would extinguish the wife's right of survivorship. *Goodwin vs. Moore*, 221.

**LIMITATION ON SUITS.**

1. The act of 1823, ch. 10, sec. 1, barring a right of action against the sureties of any sheriff, coroner or constable in three years, if suit be not brought, does not extend to the default of such officer in making an insufficient return, or no return of an execution. It extends only to cases where the officer by his return furnishes record evidence that the execution has been satisfied. *Stanly & Harris vs. Daily*, 55.
2. An admission of indebtedness to a specific amount and an express promise to pay are not necessary to take a case out of the operation of the statute of limitations. It is sufficient if an indebtedness be admitted in reference to a *particular subject matter* and a willingness be expressed to pay so much as may be due. The sum due may be ascertained by the proof. *Hale vs. Hale*, 483.
3. In order that the possession of one claimant shall neutralize the possession of another, both must be equal in the actual possession of some part of the disputed land. *Mitchell vs. Churchman's lessee*, 218.
4. If defendant had actual adverse possession of part of a hundred acre tract when it was sold by Glass, he was in adverse possession of the entire tract, and the sale of Glass would be champertous and void as to the whole tract. *Ibid.*
5. The statute of limitations runs in favor of possession of land, and a title therefor, obtained by fraud. *York vs. Bright*, 312.

**LOCATIVE INTEREST.**

See EJECTMENT.

**MALICE.**

See **CRIMINAL LAW.**

**MANDAMUS.**

The office of a writ of *mandamus* is to enforce the performance of official duty, and the officer cannot be commanded to do that which it was not lawful for him to do without such command. *Gillespie vs. Wood & Douglass*, 437.

**MOTION.**

1. A surety for a stay of execution has no remedy by motion against his principal, 57.
2. Where sheriff becomes liable to pay money for his deputy, the liability must be ascertained by a judgment against such sheriff before he is entitled to a judgment against his deputy, 64.

**MOTION BY CREDITOR AGAINST CONSTABLE.**

3. What certainty in the notice required. *McMullen vs. Goodman*, 239.

**MOTION BY EXECUTION CREDITOR AGAINST SHERIFF.**

4. Right of action when not waived by *alias fieri facias* and receipt of money thereupon, 267.
5. A motion does not lie against the sureties of a trustee alone, 505.

**MURDER.**

See **CRIMINAL LAW.**

**NEGOTIABLE PAPER.**

1. The notary in this case had been informed some fifteen months before the day of protest, by the endorser, that he resided at Jackson. He, without enquiry, transmitted a notice to Jackson to the endorser. The endorser had removed some five months before the protest, under circumstances of peculiar notoriety: Held, that due diligence had not been used to ascertain the residence of the endorser, and that he was discharged. *Planters' Bank vs. Bradford*, 39.



NEGOTIABLE PAPER—*Continued.*

2. Whenever a party has a fixed residence and place of business known to the holder of a note at the time of receiving it, a change of domicil as a matter of fact is not to be presumed; and if the holder acts upon said knowledge, on giving notice to the endorsers he will not be chargeable with negligence, unless he did, or from circumstances shown, ought to have known of such change of domicil. *Harris vs. Memphis Bank*, 519.
3. The certificate of a notary, that he gave due notice to an endorser, is not admissible evidence, unless it be made at the time of the protest, and be made "in or on the protest." *Winchester vs. Winchester*, 51.
4. Notice of protest to the endorser may be good, though directed to the wrong post office, if it appear that due diligence had been used for the purpose of ascertaining the endorser's nearest post office. Yet where the notice was directed to a post office which had been discontinued for twelve months and more before the notice was given, it was held that this was evidence of negligence in that respect, and discharged the endorser. *Davis vs. Beckham*, 53.
5. The general rule of law in reference to giving notice through the post office to an endorser, is this: The notice shall be directed to the post office nearest the residence of the endorser; yet if it be directed to the post office through which the endorser usually receives communications and transacts his business, it shall be good, though not the nearest to his residence. *Farmers' and Merchants' Bank vs. Battle & Massey*, 86.
6. It is not necessary in all cases where the endorser resides in the county in which the note is payable and protested, that a special messenger should be sent with notice. It is only necessary that notice should be sent by special messenger where the parties reside at the *same place*, which includes all those who reside in the same neighborhood and transact their business through the same post office. *Ibid.*
7. Where an endorser wrote under his name the name of his post office in compliance with a custom of the bank, established for the purpose of learning the office through which the endorser transacted his business, it was held that this was an implied direction that notice should be

NEGOTIABLE PAPER—*Continued.*

sent to such post office, and notice given accordingly fixed the liability of the endorser. *Ibid.*

8. The last endorser of a bill of exchange took a mortgage on the estate of the drawer for his indemnity, and subsequently discharged the bill and prosecuted his suit against the first endorser to judgment. Held: on bill filed by first endorser against the last, to compel the application of the indemnity to the discharge of the judgment, that no such equity existed against the second endorser by reason of such indemnity. *Applewhite vs. A. T. & E. Shaw*, 93.
9. If the second endorser had received payment in whole or part from the drawer, to that extent he would not be entitled to a recovery against the first endorser. This, however, is a defence which should have been made at law; and not having been made, a court of equity would give no relief. *Ibid.*
10. Lamb endorsed a note in blank and delivered it to Kimbro, telling him, at the time of the endorsement and delivery, to fill up the endorsement as he thought proper: Held, that this only authorized him to fill it up so as to assign the legal interest to such person as he chose. It did not authorize him to endorse on the note a special assignment, waiving demand and notice to the endorser. *Kimbrow vs. Lamb*, 95.
11. The judge charged the jury, that if the defendant endorsed a note in blank and delivered it to plaintiff, directing him to fill up the endorsement as he pleased, it did not authorize the plaintiff to endorse on the note a waiver of demand and notice to defendant: Held, that this was not charging upon the facts. See 2 Humphreys, 283, 311, 181. *Ibid.*
12. The contract of the maker of negotiable paper is broken by a refusal or neglect to pay on the last day of grace, within reasonable time after demand made, and the holder has a right of action on the same day. *Coleman vs. Ewing*, 241.
13. The 8th section of the act of 1836, ch. 43, giving an attachment in equity to an accommodation endorser or security against the principal, does not confer the remedy on a subsequent endorser against a prior endorser. *Turner vs. Newman*, 329.

NEGOTIABLE PAPER—*Continued.*

15. Whether a note has been put in circulation in due course of trade, is a mixed question of law and fact, and should be submitted to the jury under a proper charge of the court. *Gooch & Farriss vs. Massey*, 374.
16. An action of assumpsit will lie on an assignment of a bill single, under seal of assignor, which waives demand and notice. *Jones vs. Lowe*, 333.
17. To render an endorser liable, who is discharged by the neglect of the holder to give notice, there must be satisfactory proof to show, that the promise was made with a full knowledge of the discharge. It must not be left to surmise. It is wholly immaterial whether his ignorance of his discharge was the result of his ignorance of the law or the facts which discharged him. *Spurlock vs. Union Bank*, 336.
18. A person who endorses for the accommodation of the firm, having taken up the notes, becomes thereby the creditor of the firm, and has a lien on the partnership effects as against the separate creditors of the partners, for his reimbursement. *Foster vs. Hall & Eaton*, 346.
19. The act of 1801, chapter 18, section 3, discharging "assignors" of certain instruments, when the creditor fails to sue within thirty days after notice given to sue, embraces endorsers of negotiable paper. *Faris vs. Green*, 377.
20. Where a note was endorsed in blank, and deposited in bank for collection, the legal interest was transferred to the bank, and notice given by the endorser to the bank to sue, was a valid notice, and in accordance with the 3d section of the act of 1801, ch. 18. *Ibid.*
21. When the makers of paper, endorsed for their accommodation, and put by them into circulation, are used, they are estopped from disputing the endorsement, and it need not be proved. *Union Bank vs. Philips*, 388.
22. The Union Bank purchased a note payable to Chaffin, Kirk & Co. It was endorsed by Kirk, in the name of Chaffin, Kirk & Co. a dissolved firm, and subsequently endorsed by Osborne, for the accommodation, as he supposed, of Chaffin, Kirk & Co. The bank, at the time of the purchase, was aware of the fact of the previous dissolution of the firm of Chaffin, Kirk & Co. Held,

NEGOTIABLE PAPER—*Continued.*

that the bank was not bound to communicate this knowledge to Osborne, and that a failure to do so did not discharge Osborne. *Union Bank vs. Osborne*, 413.

23. Where a note was delivered over without endorsement in discharge of a pre-existing debt, a promise made to the holder to pay it, made in ignorance of the failure of consideration thereof, does not bind the maker. *Ingram vs. Morgan et als.* 66.

## NEW TRIAL.

1. Where the books of the plaintiffs were made testimony by the defendant, and the judge afterwards erroneously excluded them, and the plaintiffs moved for a new trial, on that ground alone: Held, that the court would not reverse the judgment on that ground, as the plaintiffs could not make his books testimony again, the defendant objecting thereto. *Brown & Herndon vs. Williams*, 22.
2. The verdict of a jury, which the circuit judge has refused to set aside, will not be disturbed in the supreme court, unless the preponderance of evidence is greatly against it. *Pettitt's ex'rs. vs. Pettitt*, 191.
3. Cumulative evidence is evidence which speaks to facts, in relation to which there was evidence on the trial, and a new trial ought not to be granted on such evidence, though it be new and material. *McGavock vs. Brown & Williams*, 251.
4. There is no rule of law which will exclude the admission of cross affidavits on a motion for a new trial, either in civil or criminal cases; yet the practice in civil cases ought not to be encouraged. *Ibid.*
5. The fact, that a party may from looking at the docket conclude that his suit will not come on at a given time, and it does come on sooner than was expected, in consequence of which the cause is tried in the absence of material witnesses, furnishes no ground for setting aside the verdict and granting a new trial. *McAuly vs. Lockhart*, 229.
6. New trial will be granted for misconduct of jury. *Stone vs. The State*, 27; *Jim vs. The State*, 289.

NEW TRIAL—*Continued.*

7. The rejection of a juror in a criminal case improperly, is not an error for which the court will necessarily reverse the judgment, if the defendant obtains an impartial jury of his own selection. *Henry vs. The State*, 270.
8. The supreme court will not set aside the verdict of a jury on matters of fact, unless there be a great preponderance of evidence against such verdict. This is a rule for the government of the supreme court, and not the circuit court. On the contrary, this rule of the supreme court imposes on the circuit court a heavy obligation to observe the rules of the common law, applicable to the granting of new trials in *nisi prius*, lest injustice be done. *England vs. Burt*, 399.
9. Under the plea of *non est factum*, involving the existence of a partnership, the declaration of the defendant to third persons before the execution of the instrument in question, that no partnership existed, is not evidence. What the defendant said when the note was offered to him for payment, would be evidence; such declaration being a part of the *res gestæ*. *Ibid.*
10. A new trial will not be granted on affidavits of jurors, that they misunderstood the charge of the court. *Saunders vs. Fuller*, 516.

## NOTARY PUBLIC.

See NEGOTIABLE PAPER.

## NOTICE.

1. Notice of non-payment. See NEGOTIABLE PAPER.
2. Notice of motion to constable. What degree of certainty is required. *McMullen vs. Goodman*, 239.
3. Notice of usury. *Ramsey vs. Clark*, 244.
4. Notice to guarantor. When necessary, 303.
5. Notice by surety to principal to sue, 377.
6. Notice of dissolution of partnership. *Union Bank vs. Campbell*, 394; *Union Bank vs. Osborne*, 413.
7. Notice of motion by sheriff to his deputy, 64.

## OBLIGOR.

1. By an act of assembly, a creditor may sue any one or more of several joint obligors or partners; and such suit is no bar to a suit subsequently brought against the remaining partners or obligors. *Lowry vs. Hardwick*, 188.
2. Where the plaintiff gave a joint promissor in a note a release, to render him competent; held, that the joint promissor was not competent to prove the existence of such release, much less its legal effect—it should have been produced. *Harvey and Claxton vs. Sweary*, 449.

## OCCUPANT.

See ENTRY.

## PARENT AND GUARDIAN.

See HABEAS CORPUS.

## PARTIES IN CHANCERY.

1. The widow and heirs of Alexander sold a tract of land belonging to deceased in his lifetime to Perry, and gave him a bond to convey title on payment of the purchase money. The notes were taken payable to the widow; and this bill was filed by her alone, to enforce the payment of the purchase money: Held, that the heirs were necessary parties, and that a sale of the land under a decree, would not convey the title to the purchaser. *Alexander vs. Perry*, 391.
2. See *Wood vs. Cunningham*, 417.

## PARTITION.

A partition bill filed by one heir against the others, and a decree thereupon for partition, does not estop any any of the others from asserting his claim to any portion of the land by action of ejectment. A bill in chancery for partition, is not a bill to settle conflicting rights, but to divide that which belongs to tenants in common or joint tenants amongst them; and if the title be disputed, partition will not be made until the dispute is settled by suit for that purpose instituted.—*Nicely vs. Boyles*, 177.

## PARTNERS.

1. By an act of assembly, a creditor may sue any one or more of several joint obligors or partners; and such suit is no bar to a suit subsequently brought against the remaining partners or obligors. *Lowry vs. Hardwick*, 188.
2. Where two of a firm (which was composed of three) were sued on a debt of the firm, and the execution was stayed by a third person, who was compelled to pay the same; held, that the surety for the stay of execution could maintain an action against the third member of the firm who was not sued, for money expended to and for his use. *Ibid.*
3. A person who endorses for the accommodation of the firm, having taken up the notes, becomes thereby the creditor of the firm, and has a lien on the partnership effects as against the separate creditors of the partners, for his reimbursement. *Foster vs. Hull & Eaton*, 346.
4. The filing of an attachment bill by one member of a firm against the others, dissolves the firm: not so where a creditor files the bill and attaches the property of the firm. *Ibid.*
5. To render a firm responsible for a note given by one member thereof, in his own name, it must appear that the credit was given to the firm and that the money obtained by the note went into the business of the firm; otherwise it will be treated as an election by the creditor to trust to the responsibility of the maker of the note alone. *Ibid.*
6. When one member of a firm executes his individual note to obtain money, he is not a competent witness to prove that the money was obtained on the credit of the firm and went into the business of the firm. *Ibid.*
7. The Union Bank purchased a note payable to Chaffin, Kirk & Co. It was endorsed by Kirk, in the name of Chaffin, Kirk & Co. a dissolved firm, and subsequently endorsed by Osborne, for the accommodation, as he supposed, of Chaffin, Kirk & Co. The bank, at the time of the purchase, was aware of the fact of the previous dissolution of the firm of Chaffin, Kirk & Co. Held, that the bank was not bound to communicate this knowledge to Osborne, and that a failure to do so did not discharge Osborne. *Union Bank vs. Osborne*, 413.

PARTNERS—*Continued.*

8. Under the plea of *non est factum*, involving the existence of a partnership, the declaration of the defendant to third persons before the execution of the instrument in question, that no partnership existed, is not evidence. What the defendant said when the note was offered to him for payment, would be evidence; such declaration being a part of the *res gestæ*. *England vs. Burt*, 399.
9. Where notice of the dissolution of a firm is communicated to a bank director for the purpose of being communicated to the board of directors, or where he is called upon to act as director in a transaction affecting the interests of the members of the dissolved firm, he is bound to communicate that knowledge to the bank, and if he do not, the bank is by law charged with notice of the facts so withheld. *Union Bank vs. Campbell*, 394.
10. When the makers of paper, endorsed for their accommodation, and put by them into circulation, are sued, they are estopped from disputing the endorsement, and it need not be proved. *Union Bank vs. Philips*, 388.

## PLEADINGS IN CHANCERY.

1. Though the same strictness in pleading be not required in courts of chancery as in courts of law; yet to authorize a decree in favor of complainant, the facts on which a decree is sought must be set forth in the bill, or in the answer. *Cunningham vs. Wood*, 417.
2. The bill alledged a joint ownership of the estate sued for in complainants, and the proof showed an ownership in one of them: Held, that complainants were entitled to a joint decree for the estate. *Ibid.*
3. A decree will not be made in favor of the complainant, where the allegations of the bill, which are denied by the answer, is supported by the testimony of one witness only, without any corroborating circumstances. *Baker vs. Barfield*, 514.

## PLEADINGS AT LAW.

1. Where an action of assumpsit is brought upon an instrument which itself contains a promise or undertaking to pay, it is not necessary formally to set forth another promise resulting from the legal liability. *Woodson vs. Moody*, 303.



PLEADINGS AT LAW—*Continued.*

2. Where a judgment is rendered on a verdict without a plea, such judgment is erroneous, and reversible. *Hopson vs. Fountain* 243.
3. The defendant pleaded *nil debet*, payment and set-off in short, to an action of debt; and plaintiff filed replications to the pleas also in short; and the jury returned a verdict that the defendant owed the debt in the declaration mentioned: Held, that this verdict did not dispose of the whole defence, and could not stand. *Crutcher vs. Williams*, 345.
4. When the defendant applies to amend his pleadings, the amended plea must be offered; if it be not, it is in the discretion of the court to refuse the application. *Rainey & Henderson vs. Sanders*, 447.
5. When the court sustains a demurrer to a plea in abatement, the defendant has the right to plead over, and a final judgment is erroneous. *Ibid.*
6. Where there are joint promissors, a release of one to effect the discharge of others must be a release under the seal of the party, and must be pleaded by the party wishing to discharge himself by such act of the plaintiff. *Harvey & Claxton vs. Sweasy*, 449.

See AMENDMENT.

7. Hancock summoned Wood, by warrant, to answer him as assignee of C. S. Brodie, former guardian of C. H. Howard, and offered on trial a note payable to Charles S. Brodie, guardian of Cornelius H. Howard: Held, that there was no variance between the warrant and the note, which should exclude it. *Wood vs. Hancock*, 465.
8. The warrant is not in lieu of a declaration. It is simply a summons to the defendant to appear and answer, and it may be laid down as a general rule, that whatever may be done in a court of record, by proper pleadings and proof, may be done before a justice of the peace, upon the production of the proof alone. *Ibid.*

## PRESENTMENT.

1. A presentment found, not on the knowledge of any of the grand jury, but upon information detailed to the jury by others, should be abated on the plea of defendant. *The State vs. Love*, 255.

PRESENTMENT—*Continued.*

2. The defendant has no right to impeach by plea the information of the grand juror upon whose knowledge a presentment is made. *The State vs. McManus*, 258.

## PROMISSORY NOTE.

A due bill is in legal effect a promissory note, and as such assignable and negotiable. *Marrigan vs. Page*, 247.

See NEGOTIABLE PAPER.

## PROSECUTOR.

Where a circuit judge orders a prosecution *ex officio*, it is not necessary that the order should show that it was made upon an examination of witnesses. If the order be made, it will be presumed to have been made as the statute directs. *Simpson vs. The State*, 456.

## RECOGNIZANCE.

1. The case of *The State vs. Edwards* recognized. *The State vs. Austin*, 213.
2. If a sheriff takes a recognizance and fails in his attestation to show the county of which he is sheriff, the recognizance is void. *Ibid.*
3. Where the penalty in a recognizance is forfeited, the whole amount is recoverable, or nothing; and therefore where the penalty was far too much, it was void. *Ibid.*
4. A sheriff can take bail only in the cases mentioned in the statutes: 1st, where the party has been surrendered by bail; and, 2d, where he has been committed for want of surety. The recognizance must therefore recite on its face the facts upon which the authority to take bail is based. *The State vs. Edwards*, 226.
5. A deputy sheriff has no power to take bail in either of the above cases. *Ibid.*
6. The legislature has no power to extend the obligation of bail to a more remote day than that mentioned in the recognizance. *Ibid.*
7. The sickness of a defendant constitutes no reason for his non-appearance in obedience to the recognizance that will excuse the bail at a subsequent term. *Ibid.*

**REDEMPTION.**

1. The purchaser of land at execution sale, becomes by his purchase and the deed of the sheriff vested with the title, and a tender or payment of the purchase money, with ten per cent thereupon, does not revest the title in the execution debtor, so as to enable him to maintain an action of ejectment against the purchaser. *Paris vs. Burger*, 325.
2. The execution debtor whose land is sold, is entitled to a reconveyance of the land when he tenders the redemption money, as required by statute; and if it be not made, the right may be enforced in equity. *Ibid.*
3. A tender of money for the redemption of real estate, sold by decree in chancery before the confirmation of the master's sale, was premature, and did not authorize a decree. The creditor is allowed by law two years to redeem, commencing from the confirmation of the chancery sale. *Wood, Abbott et als. vs. Morgan, Allison et als.* 371.

**RELEASE.**

See **WITNESS.**

**RETURN DAY.**

The first day of the term is the return day of executions. *Browning vs. Jones*, 69.

**ROADS.**

See **INDICTMENT.**

1. An order appointing a jury of freeholders to view and lay out a public road, is an order laying out a public road within the meaning of the act of 1804, chapter 1, section 1, and therefore such an order, made by less than twelve justices or one third of the justices of the county, is void by the act of 1817, chapter 48. *Ingram vs. Wilson*, 424.
2. The legislature have the power to authorize companies, chartered to construct turnpikes, to construct them on existing public roads, and the constructing of such turnpikes abolishes the old roads on which they are located, or which run parallel with and adjoining them. *Nolensville Turnpike Company vs. Baker*, 315.

**SCIRE FACIAS.**

See RECOGNIZANCE.

Williams and McLaughlin were jointly entitled to recover cost from Chaffin, who was the surety for the prosecution of a suit against them which had failed. A *scire facias* was issued, showing a joint right of recovery, but the verdict and judgment rendered on the *scire facias* were in favor of Williams alone: Held, that the judgment should have been arrested on motion of the defendant. *Chaffin vs. Williams*, 231.

**SEIZIN.**

See COVENANT.

**SHERIFF.**

1. Where a sheriff has paid money for his deputy he can recover a judgment against the deputy by motion, without having the extent of such sheriff's liability ascertained by a judgment against him. *Jarnagin vs. Atkinson*, 470.
2. The sheriff is by law the collector of state and county taxes, and a bond given by a deputy sheriff faithfully to discharge the duties of a deputy, embraces a default in not paying over taxes collected by such deputy. *Ibid.*
3. The act of 1823, chapter 10, section 1, barring a right of action against the sureties of any sheriff, coroner or constable in three years, if suit be not brought, does not extend to the default of such officer in making an insufficient return, or no return of an execution. It extends only to cases where the officer by his return furnishes record evidence that the execution has been satisfied. *Stanly and Harris vs. Daily*, 55.
4. The act of 1829, ch. 11, sec. 1, gives to the sheriff a remedy by motion against his deputy and sureties, upon ten days' notice, when he shall have "become liable to pay money for the default or misconduct of his deputy:" Held, that a just construction of this act requires that the default or misconduct of the deputy should be judicially ascertained before the sheriff shall have his remedy. *W. & R. C. Patterson vs. Coleman*, 64.
5. A notice given before default ascertained is therefore

**SHERIFF—Continued.**

- premature; but if the deputy appear after judgment is rendered against the sheriff, the court would be authorized then to render judgment against the deputy. *Ibid.*
6. The first day of the term is return day of executions. *Browning vs. Jones*, 69.
  7. A sheriff or constable is authorized to demand a bond of indemnity from plaintiff in execution before levy, in all cases of disputed title to property; and if it be not given, he may return the *feri facias* no property found. He is not bound to take the responsibility of judging of title in any case where it is disputed. *Saunders & Martin vs. Harris*, 72.
  8. If a sheriff take a recognizance and fail in his attestation to show the county of which he is sheriff, the recognizance is void. *The State vs. Austin*, 213.
  9. A sheriff can take bail only in the cases mentioned in the statutes: 1st, where the party has been surrendered by bail; and, 2d, where he has been committed for want of surety. The recognizance must therefore recite on its face the facts upon which the authority to take bail is based. *The State vs. Edwards*, 226.
  10. A deputy sheriff has no power to take bail in either of the above cases. *Ibid.*
  11. A sheriff, after default in returning a *feri facias*, requested the plaintiff to issue an alias for his benefit. It was issued; the plaintiff informing him, that in doing so he did not intend to waive his right of action: Held, that there was no waiver, though a part of the money was collected by the alias and received by the plaintiff after the default. *Kirkmans vs. Rice*, 267.
  12. The issuance of an alias *feri facias*, collection of a portion of the money thereupon, and receipt of it by the plaintiff, is no waiver of a previous default of a sheriff on the non-return of the original *feri facias*. *Doyle vs. Glenn*, 309.
  13. An officer in default, who has paid off the *feri facias*, has no equity against the defendant in the *feri facias*. The payment of the *feri facias* is the penalty the law inflicts upon him for his neglect of duty. *Ibid.*

**SHERIFF—Continued.**

14. The levy of a *feri facias* on personal property vests in the sheriff the legal right to the property for the use of the plaintiff; and the sheriff, after the return of the *feri facias*, may sell, and the sale will be valid. *Lester's case*, 383.

See **FIERI FACIAS. LEVY. REDEMPTION. LIEN.**

15. Where a jailer employed a slave, who was committed to jail as a runaway, in the cultivation of his farm, such employment was a conversion of the slave, which rendered both the sheriff and jailer liable in the event of the escape of such slave. *Cain & Horn vs. Kelly*, 472.

**SLANDER. See LIBEL.**

1. In an action for slander the defendant pleaded justification, and after the testimony was submitted to the jury the defendant moved the court to amend his plea of justification, so as to embrace any speaking of the words imputed before action brought. The defendant insisted that the amendment should be allowed only on condition of a mistrial and continuance. The court allowed the amendment without the condition: Held, that this was erroneous. The amendment should have been allowed, a mistrial entered, and the cause continued.—*Fowlks vs. Long*, 511.
2. When the witness of plaintiff in an action of slander, under the plea of justification, stated in reply to interrogatories put to him by the plaintiff respecting the plaintiff's character, that some persons spoke well of him, and some spoke ill of him; and being asked by plaintiff who spoke ill of him, said, J. M. charged him with a specific offense: Held, that it became, *under the circumstances*, material whether J. M. did make the charge or not, and plaintiff had the right to prove by J. M. that he did not make it. *McLarin vs. The State*, 381.

**SLAVES.**

1. Slaves decoyed into the state for the purpose of being subjected to attachment, not subject to attachment.—*Timmons vs. Garrison*, 148.
2. Slaves carried into Mississippi for sale. Sale void, and

SLAVES—*Continued.*

- purchase money not recoverable in Tennessee. *Yerger vs. Rains*, 259.
3. Indictment against, for attempt to commit a rape on a white woman, 270.
  4. Indictment against, for murder, 290.
  5. Slaves not allowed to practice medicine. *Mucon vs. The State*, 421.
  6. Fraud in the sale of an idiot slave. *Belew vs. Clark*, 506.
  7. Indictment for forcibly taking a slave from the field of his master, not good. *The State vs. Watkins*, 256.

## SPECIFIC ARTICLES.

1. A due bill is in legal effect a promissory note, and as such assignable and negotiable. *Marrigan vs. Page*, 247.
2. The word "payee" in the act of 1807, chapter 95, embraces an assignee, and the assignee of a note for specific articles, is entitled to recover the value of specific articles in his own name, upon compliance with the requisitions of the statute. *Ibid.*
3. A justice of the peace has jurisdiction to the extent given by the legislature over money demands, in all cases where, by the terms of the contract, specific articles are to be delivered, or services performed, if such contract ascertain the money value of such services or articles. *Ibid.*

## SPECIFIC PERFORMANCE.

Bryan gave Outlaw a bond to convey him six hundred and forty acres of land, section 15. They subsequently made a verbal agreement, that the bond should be discharged by conveyance of section No. 14, instead of 15, and Outlaw took possession of it. Isler, his son-in-law, his daughter, (she being the only heir,) and his widow, refused to convey either. Outlaw sued on the bond, and the defendant Isler, as administrator of Bryan, pleaded lunacy of obligor. Judgment was rendered, and thereupon the son-in-law, the daughter, and widow

**SPECIAL PERFORMANCE—Continued.**

of the deceased, filed their bill to enjoin the judgment, and compel Outlaw to accept in discharge thereof section 15: Held, that they were not entitled to the relief prayed for. *Isler vs. Outlaw*, 118.

**STAY.**

1. The act of 1801, chapter 15, giving a remedy by motion to sureties on any bill, bond, note or obligation, against whom a judgment may have been rendered, does not embrace the case of a surety for stay of execution, who has satisfied such execution. The liability of a stayor of execution, springs from an act in the nature of a confession of judgment, and not from any note, bill, bond or obligation. *Frost vs. Rucker & Payne*, 57.

See **JUSTICE OF THE PEACE**.

2. A court of law can hear testimony to establish the relation of principal and surety in a sealed instrument, when a party claims his discharge under the act of 1825 as a surety on the ground that the judgment obtained against him as a surety was stayed without his joining in with the principal in procuring the stay. *White vs. Brown*, 292.

**SUMMARY PROCEEDING.**

See **MOTION**.

**SURETIES.**

1. The act of 1823, ch. 10, sec. 1, barring a right of action against the sureties of any sheriff, coroner or constable in three years, if suit be not brought, does not extend to the default of such officer in making an insufficient return, or no return of an execution. It extends only to cases where the officer by his return furnishes record evidence that the execution has been satisfied. *Stanly & Harris vs. Daily*, 55.
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SURETIES—*Continued.*

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4. The act of 1817, ch. 119, sec. 1, giving a summary remedy against sureties in injunction bonds, cannot be extended beyond the express letter of the statute, to wit, to cases where the injunction is dissolved by motion in the progress of the case, and where it is dissolved on final hearing. *Garratt vs. Eliff*, 323.
5. The statute does not authorize a judgment in the summary manner prescribed in the statute, where the complainant dies, and the injunction is dissolved by the abatement of the bill. *Ibid.*
6. The 8th section of the act of 1836, ch. 43, giving an attachment in equity to an accommodation endorser or security against the principal, does not confer the remedy on a subsequent endorser against a prior endorser. *Turner vs. Newman*, 329.
7. Where the plaintiff gave a joint promissor in a note a release, to render him competent; held, that the joint promissor was not competent to prove the existence of such release, much less its legal effect—it should have been produced. *Harvey and Claxton vs. Sweasy*, 449.
8. A judgment by motion cannot be rendered against the sureties of the trustee alone for money by him collected and not paid over, though the principal be dead. *Houston vs. Dougherty's sureties*, 505.

## TAX SALE.

See *Rogers vs. Park*, 480.

## TENDER.

Where a party attempted to make a formal tender, but was prevented from so doing by the refusal of the other party to remain till the money could be counted; it is held, that this was equivalent in legal effect to a tender. *Raines vs. Jones*, 490.

## TRESPASS.

1. In an action of trespass the plaintiff may prove special damages if they are strictly the consequence of the trespass committed, or if the act done by the defendant causing such special damages constitutes a part of one entire transaction, of which the principal trespass was the commencement. *Damron vs. Roach*, 134.
2. Damron pulled down the fence of Roach, whereby the cattle of Roach escaped and were lost: Held, that the loss of the cattle was strictly the consequence of the trespass, and evidence thereof admissible in an action of trespass for throwing down the fence and permitting the cattle to escape. *Ibid.*

## TROVER.

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## USURY.

1. If a note is made for sale in market to raise money, and is sold at a greater rate of discount than six per centum, the transaction is usurious if the purchaser is cognizant of the facts at the time of the purchase; *secus*, if he was not informed of the facts at the time of purchase.—*Ramsey vs. Clark*, 244.
2. A note was made for sale, and purchased up at a greater rate of discount than six per centum, with a knowledge of the purpose for which it was made: Held, that the transaction was usurious, and that the note was subject to a deduction of the excess in the hands of the purchaser or his assignee. *Gooch & Farriss vs. Massey*, 374.

## VENDOR AND VENDEE.

See CHANCERY. COVENANT.

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1. A settled rule in the construction of wills is, that the intention of the testator shall be carried into effect whenever it can be done without violating some established rule of law. *Henry vs. Hogan*, 208.

**WILL—Continued.**

2. A clause in a will provided that the slaves of testator should be emancipated, and charged the real and personal estate of the testator with the expenses of emancipation and transportation of the slaves. The will, by a subsequent clause, devised all the real estate and the balance of his personal estate to certain devisees: Held, that these clauses of the will were not incompatible, but that the devisees took the real estate subject to the charge imposed on them by the previous clause.—*Ibid.*
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To make a nuncupative will good, it is not necessary that the testator should have specially required two persons to bear witness to his disposition of his effects in the words of the statute. It is sufficient if there exists in his mind at the time a fixed purpose to perform a testamentary act, and that two persons feel themselves called upon by the language addressed to them to notice the disposition of his effects. *Baker vs. Dodson*, 342.

**WITNESS.**

1. A party to a note who was sued on it and afterwards obtained his discharge under the bankrupt law, is a competent witness after such discharge to prove the note usurious. *Carman's ex'r. vs. White*, 301.
2. A stockholder who sells his interest in the stock of a bank, after a suit is instituted by the bank, is a competent witness in such suit. The 3d section of the act of 1821, chap. 66, does not embrace such a case. *Union Bank vs. Owen*, 338.
3. When one member of a firm executes his individual note to obtain money, he is not a competent witness to prove that the money was obtained on the credit of the firm and went into the business of the firm. *Foster vs. Hall & Eaton*, 346.

**WITNESS—Continued.**

4. A joint promissor in a note is not a competent witness to prove in an action against the others, that they signed the note or authorized another to sign it in their names. *Harvey & Claxton vs. Sweasy*, 449.
5. Where the plaintiff gave a joint promissor in a note a release to render him competent; held, that the joint promissor was not competent to prove the existence of such release, much less its legal effect—it should have been produced. *Ibid.*

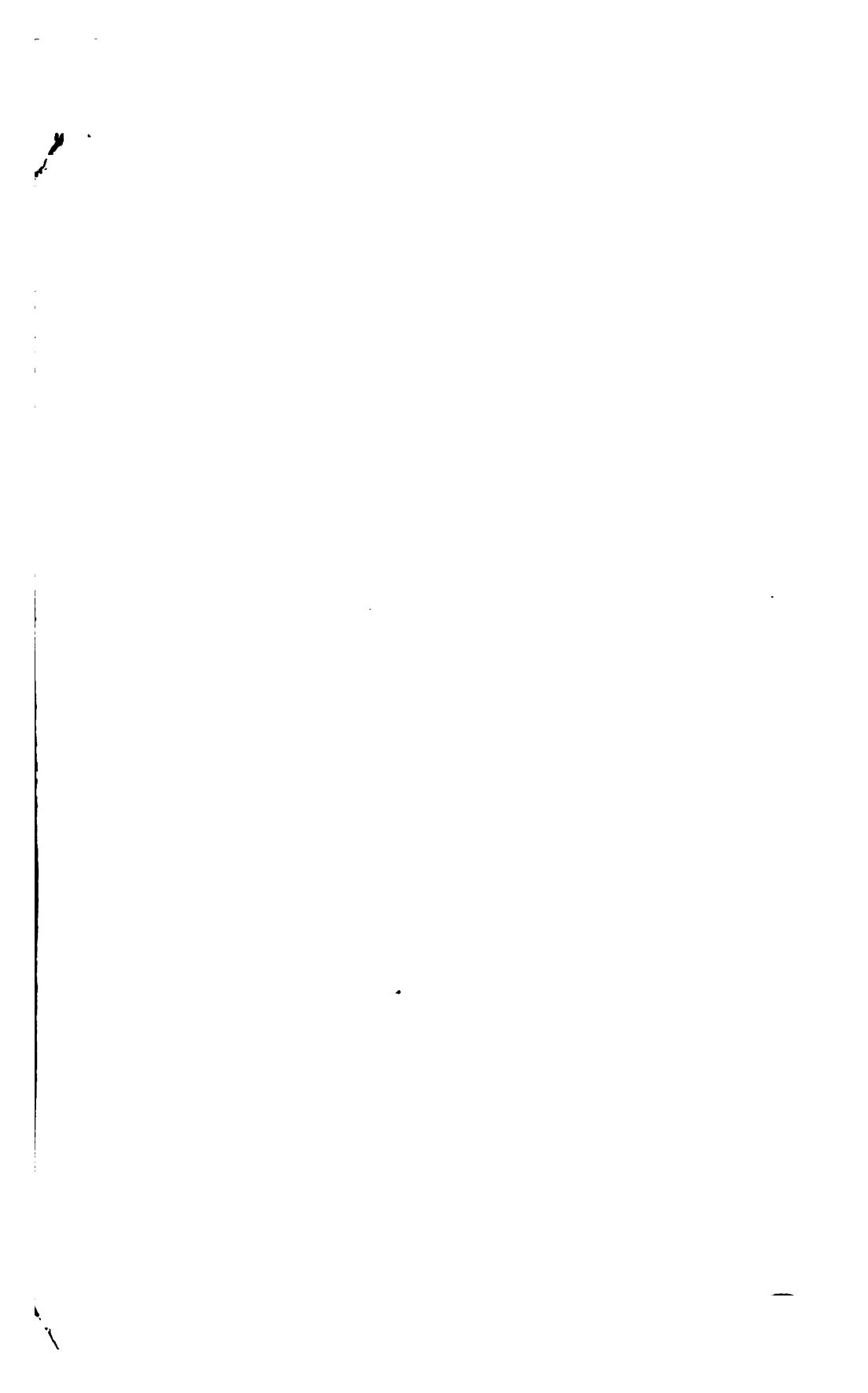
*L. H. A. A.*  
— " —

☞ The case of the *Union Bank* against *Owen* was argued by Mr. Washington and Ed. Ewing for the Bank, and by Campbell, Meigs and Marshall for Owen.

The case of *Foster vs. Hall & Eaton* was argued by Fogg, Marshall and Campbell for Foster, and Meigs and Ewing for Eaton.

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## TRESPASS.

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